EDITOR'S NOTE

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No. 85-1835-CSY
Status: GRANTED

Title: California, Petitioner
v.
Peter Rooney

Docketed:
May 6, 1986

Court: Court of Appeal of California,
Second Appellate District

Counsel for petitioner: Sondheim, Harry B.

Counsel for respondent: Lewis, Arthur, Hanson, Roger S.

Entry	Date	Note	Proceedings and Orders
1	May 6 1986	G	Petition for writ of certiorari filed.
2	Jun 10 1986		DISTRIBUTED. June 26, 1986
3	Jun 30 1986	P	Response requested. (Due July 30, 1986 - NONE RECEIVED)
5	Jul 21 1986		Order extending time to file response to petition until August 29, 1986.
6	Sep 17 1986		Brief of respondent Peter Rooney in opposition filed.
7	Sep 17 1986		REDISTRIBUTED. October 10, 1986
8	Oct 14 1986		Petition GRANTED.
			**********
9	Nov 20 1986		Record filed.
10	Nov 26 1986	G	Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae filed.
11	Nov 26 1986		Brief amicus curiae of California, et al. filed.
12	Nov 28 1986		Joint appendix filed.
13	Nov 28 1986		Brief of petitioner California filed.
14	Dec 8 1986		Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae GRANTED.
15	Dec 29 1986		Brief of respondent Peter Rooney filed.
16	Jan 2 1987		Brief amicus curiae of CA Public Defender's Assn. filed.
17	Feb 6 1987		CIRCULATED.
18	Feb 6 1987		SET FOR ARGUMENT. Wednesday, March 25, 1987. (3rd case)
19	Feb 24 1987	D	Motion of respondent for divided argument filed.
20	Mar 9 1987		Motion of respondent for divided argument DENIED.
21	Mar 11 1987	X	Reply brief of petitioner California filed.
22	Mar 25 1987		ARGUED.

85-1885

Supreme Court, U.S.
FILED
MAY 6 1986
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether there can be reasonable expectation of privacy, for the purposes of the Fourth and Fourteenth Amendments, with respect to garbage placed in a communal trash bin of a multi-unit apartment building.

2. Whether there is an abandonment of property, for purposes of the Fourth and Fourteenth Amendments, when garbage is placed in a communal trash bin of a multi-unit apartment building.

3. Whether the Fourth and Fourteenth Amendments are violated when a police officer searches a communal trash bin of a multi-unit apartment building without a search warrant, probable cause, or consent.

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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

PETER ROONEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Court of Appeal of the State of California, Second Appellate

District, Division Seven, reversing the order of the trial court dismissing the criminal action against respondent and holding that there was probable cause for the issuance of a search warrant even if incriminating items found in a trash bin are excluded, but holding that such items found in the trash bin were obtained in violation of the Fourth Amendment. The judgment and order of the Court of Appeal was filed on December 13, 1985. An order modifying the opinion was filed by the Court of Appeal on December 19, 1985. Petitions for rehearing were denied by the Court of Appeal on January 7, 1986. Petitions for review by the California Supreme Court, filed respectively by petitioner and respondent, were denied on March 13, 1986. An Application by peitioner for a stay of

petitioner for a stay of issuance of the remittitur was granted by the Court of Appeal on March 20, 1986.

OPINIONS BELOW

The opinion of the Court of Appeal, with the order of modification of opinion, appears as Appendix A of this petition. It is published as People v. Rooney, 175 Cal.App.3d 634 (1985). A copy of the Court of Appeal's order denying petitions for rehearing is attached hereto as Appendix B. The order of the California Supreme Court denying petitions for review is attached hereto as Appendix C. The order of the Court of Appeal granting the application of stay of issuance of remittitur is attached hereto as Appendix D.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven was filed on December 13, 1985, and the opinion was modified on December 19, 1985. Timely petitions for rehearing were denied by the Court of Appeal on January 7, 1986. Timely petitions for review were denied by the California Supreme Court on March 13, 1986. Where the highest state court has jurisdiction to review a decision of a lower state court, but refuses to do so the time for petitioning for a writ of certiorari runs from the date of the refusal to review. (American Railway Express Co. v. Levee 263 U.S. 19, 20-21 (1923).) This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C. section 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE[1/]

Respondent was charged in a felony complaint with having committed, on or about January 22, 1984: bookmaking (California Penal Code section 337a, subdivision 1) in count I; keeping a place with paraphernalia (id., subdivision 2) in count II; recording wagers (id., subdivision 4) in count III; permitting a place to be used for bookmaking purposes (id., subdivision 5) in count IV; and accepting wagers (id., subdivision 6) in count V. (CT: 33-37.) Respondent moved that the magistrate quash a search warrant pursuant to Penal Code section 1538.5 and a hearing was held on said motion to quash and dismissed the felony on April 12, 1984. The magistrate granted the motion to quash and dismissed the felony complaint after it was represented that the

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1. The designation "CT" refers to the Clerk's Transcript. The designation "RT" refers to the Reporter's Transcript.

People would be unable to proceed. (CT: 21/11-22.)

The prosecution moved in the Superior Court that the felony complaint be reinstated pursuant to Penal Code section 871.5. (CT: 38-41.) On May 16, 1984, the Superior Court granted the People's motion to reinstate the felony complaint. Respondent then waived his right to a preliminary hearing. The parties stipulated that respondent be bound over to the Superior Court and that the information be deemed filed on that date with the same charges as in the felony complaint. Respondent then was arraigned and pleaded not guilty, and the cause was continued. (CT: 90.)

On May 24, 1984, respondent moved to suppress evidence pursuant to Penal Code section 1538.5. (CT: 91-94.)

On June 6, 1984, a hearing was held in the Superior Court on said motion. After argument, that court granted the motion to dismiss. After a representation that the People would be unable to proceed, the Superior Court dismissed the criminal action. (CT: 95; RT: 10/15-11/5.) The People appealed from that order.

The Court of Appeal reversed the order dismissing the criminal action against respondent. It ruled that a search warrant used to obtain evidence was supported by probable cause, but held that the incriminating items found in the trash bin belonging to the multi-unit apartment building in which respondent lived to have been seized in violation of the Fourth Amendment, prior to the issuance of the search warrant. By virtue of the Court of

Appeal's ruling, these incriminating items will therefore be inadmissible at the forthcoming trial of respondent.

STATEMENT OF FACTS

The instant case pertains to the sufficiency of the affidavit in support of a search warrant and to the admissibility of evidence seized prior to the issuance of that warrant. The warrant (CT: 23-25) authorized the search and seizure of evidence pertaining to bookmaking at apartment #8, 1120 North Flores Street, West Hollywood. The supporting affidavit (CT: 26-32) contained an opinion of the affiant and his partner officer that a straight-in-back office bookmaking operation was conducted at the premises in question. (CT: 32/9-25.)

We summarize the affidavit, in its salient aspects, as follows: A confidential informant informed the affiant, on December 3, 1983, "that Pete Rooney at telephone number 213-656-8430 was accepting wagers on professional football events . . . ." The affiant confirmed "through Departmental sources" that the telephone number was listed to 1120 North Flores Street, apartment #8, West Hollywood, with Peter Ryan as subscriber. A record check disclosed that Peter Rooney had one prior bookmaking arrest, on September 11, 1978, at the same address. The affiant obtained a booking photograph of Peter Rooney. (CT: 29/4-19.)

On December 15, 1983, affiant and his partner officer went to 1120 North Flores Street. They walked down the driveway to the apartment trash bin, approximately

8 feet long by 4 feet wide by 5 feet high, located in the subterranean garage of the apartment building.[2/] There was trash spilling out of the bin onto the ground. The officers searched the bin and noticed that trash from numerous different apartments was co-mingled inside it. When they reached the bottom half of the bin, the affiant noticed a paper shopping bag with mail addressed to Pete Rooney, 1120 North Flores, #8, Los Angeles. Within this bag

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2. The Court of Appeal's opinion refers to the apartment building as having twenty eight units. (Appendix A, p. 3.) However, neither the warrant nor affidavit specified the number of apartments in the building. It is described as simply being a "two story multi-unit building." (CT: 23, 26.) The origin of the Court of Appeal's statement appears to have been a representation made by a deputy district attorney to the magistrate, which was not challenged by defense counsel. (CT: 7/7-9.)

of trash, the affiant discovered, inter alia, pieces of paper with sports wagers, pays and owes, and a tally sheet of wagers on different professional football teams. There was mail addressed to Pete Rooney, but not to Peter Ryan in this bag. (CT: 29/20 - 30/10.)

On December 16, 1983, the affiant observed a male caucasian, whom he recognized from the booking photograph to be Peter Rooney, drive into the subterranean garage at the apartment building in question and then enter apartment #8. (CT: 30/15-21.)

Between December 30, 1983 and January 6, 1984, the affiant dialed telephone number 213-656-8430 and overheard a telephone conversation between "a citizen informant and an unknown male." The informant asked the unknown male, "What's the latest line?" The unknown male returned with the latest line on the professional

football games to be played. (CT: 31/8-14.) Both affiant and his partner officer had bookmaking expertise. (CT: 31/24-32/8.)

HOW THE FEDERAL QUESTION IS PRESENTED

Respondent's motion to suppress evidence asserted as one ground for the motion "that the trash can search was in violation of Edwards [71 Cal.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969)] and Krivda, 5 Cal.3d 357 [486 P.2d 689, 96 Cal. Rptr. 62] (1971)." (CT: 94.) At the hearing on the motion to suppress, respondent clearly claimed that respondent's reasonable expectation of privacy was violated by the search of the communal trash bin. (RT: 6/2-12.) The trial court expressly grounded the granting of the motion to suppress upon the issue pertaining to the search of the trash bin. (Id.: 10/15-25.)

The Court of Appeal, in its opinion reversing the dismissal order, ruled that: (1) the warrantless search of respondent's apartment building's trash bin constituted an unreasonable search and seizure because of the lack of probable cause; and (2) that the search warrant affidavit provided probable cause for the issuance of the search warrant even excluding the items seized from the trash bin. By virtue of this ruling, incriminating items recovered from the bin will be inadmissible evidence at respondent's forthcoming trial.

At first blush, it might be urged that a petition for writ of certiorari should not be granted because the Court of Appeal's conclusion that the search of the apartment building communal trash bin was unreasonable constitutes obiter dicta. However, the Court of Appeal's determination

that the search of the trash bin was unreasonable cannot be deemed to merely constitute obiter dicta. Unless overturned on this point, the Court of Appeal's conclusion constitutes the law of the case. (See People v. Shuey 13 Cal.3d 855, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975). Hence at the trial, the People would be precluded from introducing evidence as to what the police officers had found in the trash bin, i.e., a brown paper shopping bag with mail addressed to defendant and pieces of papers constituting evidence of bookmaking operations.

Accordingly, the suppression of the evidence pertaining to the search of the trash bin is a "final judgment" so as to confer jurisdiction over the case on the Court because the People's suppression claim would be moot if the accused were convicted and if the accused were acquitted, the People would

be precluded from pressing its federal claim again on appeal. (New York v. Quarles __U.S.__, 104 S.Ct. 2626, 81 L.Ed.2d 550, 554 n. 1. (1984).)

The Court of Appeal held that the search of the communal trash bin violated the search-seizure provisions of both the Federal and California Constitutions. However, the prosecution in the instant case began after June 9, 1982. Article I, section 28, subdivision (d) of the State Constitution abrogates "a defendant's right to object to and suppress evidence seized in violation of the California, but not the federal Constitution" (In re Lance W. 37 Cal.3d 873, 879, 694 P.2d 744, 210 Cal. Rptr. 631 (1985)) with respect to prosecutions committed after June 9, 1982, the effective date of the adoption of Proposition 8. (People v. Smith 34 Cal.3d 251, 258 667 P.2d 149, 193

Cal. Rptr. 692 (1983).) The Court of Appeal noticed the applicability of the abrogation of the exclusionary rule based solely upon State constitutional grounds. (Appendix A, pp. 12-18.) Hence the Fourth Amendment issue is squarely before this Court.

REASONS WHY THE WRIT SHOULD BE GRANTED

In People v. Krivda 5 Cal.3d 357, 468 P.2d 689; 95 Cal. Rptr. 62 (1971), the California Supreme Court held that marijuana remnants found by the police in a warrantless search of defendant's trash barrells, which had been placed on the parkway adjacent to the sidewalk and whose contents had not lost their identity by being combined with a conglomeration of other trash, were the product of an illegal search.

Although the Court of Appeal conceded in the instant case that "it appears logical to conclude that a tenant who places trash in a communal trash bin possesses less of a privacy expectation than one who places trash in a privately owned trash can such as [People v.] Edwards [71 Cal.2d 1096, 458 P.2d 713, 80 Cal. Rptr. 633 (1969)] and Krivda, we are not prepared to adopt an 'open fields' rule for communal trash bins, thereby eliminating the need for any particular showing of [probable] cause." (Appendix A, p. 9. Bracketed matter supplied.)

This Court granted certiorari with respect to Krivda in 1972 (405 U. S. 1039), but subsequently the judgment of the California Supreme Court was vacated and the cause remanded to that court for appropriate

proceedings as this Court was unable to determine whether the California court had based its holding upon the Fourth and Fourteenth Amendments to the United States Constitution, or upon the equivalent California constitutional provision, or both. (California v. Krivda 490 U.S. 33 (1972).) Subsequently, the California Supreme Court reissued its initial opinion pursuant to this Court's mandate for further proceedings (Krivda, 490 U.S. 33), and certified that it relied upon both the Fourth Amendment and the State Constitution. Accordingly, the latter's search-seizure provision furnished an independent ground. to support its holding. (People v. Krivda 8 Cal.3d 623 504 P.2d 457, 105 Cal. Rptr. 521 (1973).) Under what is now existing practice, it is likely that this Court would have decided Krivda on its merits. (See

Michigan v. Long 463 U.S. 1032, 1040-1041 (1983)), where this Court indicated that it might review a state court decision which "fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." In any event, it is clear that the ruling below is based solely upon an interpretation of the Fourth Amendment. We respectfully urge that if this issue was worthy of review by this Court in 1972, it is still worthy of review in 1986.

The opinion of the Court of Appeal noted that "various federal courts have held that trash placed in an area where it can be collected is abandoned property that is

not protected by the Fourth Amendment."[3/]

(Appendix A, p. 13, Citations omitted.)

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3. These cases (including those cited by the Court of Appeal) are: United States v. Michaels, 726 F.2d 1307, 1312-1313 (CA8 1984); United States v. Kramer, 711 F.2d 789, 792 (CA7 1983); United States v. Terry 702 F.2d 299 (CA2 1983); United States v. Sumpter, 669 F.2d 1215, 1221 (CA8 1982); United States v. Reicherter, 647 F.2d 397, 399 (CA3 1981); United States v. Biondich 652 F.2d 743, 745 (CA8 1981); United States v. Vahalik, 606 F.2d 99, 100-101 (CA5 1979); United States v. Crowell, 586 F.2d 1020, 1024-1025 (CA4 1978); United States v. Shelby, 573 F.2d 971, 973 (CA7 1978); United States v. Alden, 576 F.2d 772, 777 (CA8 1978); Magda v. Benson, 536 F.2d 111, 112, 113 (CA6 1976); United States v. Mustone, 469 F.2d 970, 973 (CA1 1972); United States v. Dzialak, 441 F.2d 212, 215 (CA2 1971); United States v. Minker, 312 F.2d 632, 634-635 (CA3 1962).

There are state cases to the same effect.[4/] A significant factor indicating whether this Court will grant certiorari is "[w]hen a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals." (Rule 17.1(b), Rules of the United States Supreme Court.)

Insofar as the Krivda rule is considered as a rule of evidence, the Fourth

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4. These include: State v. Oquist, 327 N.W.2d 587, 590-591 (Minn. 1982); State v. Smith, 510 P.2d 793, 796 (Alaska 1973); State v. Fassler, 108 Ariz. 585, 503 P.2d 807, 813-814 (Arizona 1972); Croker v. State, 477 P.2d 122, 123 (Wyo. 1970); State v. Schultz, 388 So.2d 1326, 1329 (Fla.App. 1980); People v. Klausing, 41 Ill.App.3d 588, 353 N.E.2d 441, 444 (Ill.App. 1976); People v. Huddleston, 38 Ill.App.3d 277, 347 N.E.2d 76, 80 (Ill.App. 1976).

Amendment now constitutes its sole justification. We urge that Krivda was erroneously decided since it does not follow the precedent of this Court in the area of abandonment. (See Abel v. United States 362 U.S. 217 (1960); Hester v. United States, 265 U.S. 57 (1924).) Secondly, the Krivda doctrine has been irreparably eroded by this Court's opinions applying Katz v. United States, 389 U.S. 347 (1967) to analogous situations. (See, e.g., Smith v. Maryland, 442 U.S. 735, 743-744 (1979); United States v. Miller, 425 U.S. 435, 442-443 (1976).)

Another reason for concluding that there was no reasonable expectation of privacy is that a communal trash bin of an apartment building is especially likely to be subject to trespassory and other incursions. It is not simply the presence of a likelihood that there might be many trespassory incursions into exterior trash

receptacles that is controlling. In addition to respondent and other occupants of his apartment and to trash collectors, the occupants of twenty-seven other apartments in the same apartment building also had legitimate access to the communal trash bin. And the owners and managers of the apartment building, or their agents, had similar legitimate access. Under the circumstances of this case, defendant had even less reasonable expectation of privacy with respect to the trash placed in the communal trash bin, to which occupants of twenty-seven other apartments had legitimate access, than a person who places his trash in a neighbor's garbage can. Yet, in the latter case, it has been held there is no reasonable expectation of privacy. (People v. Superior Court (Barrett) 23 Cal. App.3d 1004, 1010, 100 Cal. Rptr. 604 (1972).)

Finally, the critical issue is whether a search of a communal trash bin infringes an expectation of privacy that society is prepared to consider reasonable. (United States v. Jacobsen __ U.S. __, 80 L.Ed.2d 85, 103, 104 S.Ct. 1652, 1661 (1984).) As the United States Supreme Court has declared: "The concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the authorities." (Id., 104 S.Ct. at 1661.) Moreover, "it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by laws must have a source outside the Fourth

Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." (Id., 104 S.Ct. at 1661 n.22.)

For the foregoing reasons, it is respectfully requested that certiorari be granted in order for this Court to rule that a search of an overflowing communal trash bin, and indeed any trash receptacle so placed as to indicate its readiness for collection, without probable cause or consent, does not violate the Fourth Amendment.

CONCLUSION

When garbage is placed in a trash bin, it continues to be garbage when it is taken out. The Court below transformed what respondent thought was

garbage when placed in the bin into constitutionally protected property when taken out by the police. A grant of certiorari would give this Court an opportunity to make it clear that the Fourth Amendment was adopted for more noble purposes than the protection of discarded garbage.

Respectfully submitted,

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District Attorney of the
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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Appellant, v. PETER ROONEY, Defendant and Respondent.	No. B006936 (Super.Ct. No. A 088619)

APPEAL from a judgment of the Superior Court of Los Angeles County. D. Fitts, Judge. Reversed.

Ira Reiner, District Attorney of Los Angeles County, Donald J. Kaplan and Arnold T. Guminski, Deputy District Attorneys, for Plaintiff and Appellant.

(Court of Appeal, Second Dist., Filed December 13 1985, Clay Robbins, Jr., Clerk.)

Arthur Lewis, for Defendant and Respondent.

The People bring this appeal (Penal Code, § 1238, subd. (a)(7)[1] from the order dismissing the case against defendant who was charged with bookmaking (§ 337a). The dismissal was entered after the prosecution represented that it could not proceed due to the granting of defendant's motion to quash a search warrant and suppress evidence (§ 1538.5). The first issue before us is whether the warrantless search of the defendant's apartment building's trash bin constituted an unreasonable search and seizure. We conclude that it did for lack of probable cause. The second issue is

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1. Hereafter, all section references are to the Penal Code.

whether a police officer's affidavit provided probable cause for the issuance of the search warrant authorizing the search of defendant's apartment. We conclude that even excluding the items seized from the trash bin, the tip from the informant coupled with other corroborating evidence were sufficient to support the warrant. We therefore reverse and remand.

I

FACTUAL AND PROCEDURE BACKGROUND

The following evidence was before the magistrate. On December 3, 1983, an informant told the affiant, Officer Shorb, that defendant, Peter Rooney, was accepting wagers on professional football games over the telephone and with an answering machine at (213) 656-8430. Although the informant told Shorb that defendant was "in the loca-

tion between 1600 hours and 1800 hours," the informant did not tell Shorb the address of "the location."

On December 7, 1983, Shorb ascertained through the telephone company that the number given to him by the informant was registered to a Peter Ryan at 1120 North Flores Street, Apartment #8, West Hollywood. Shorb also determined that the utilities at that address were registered in the name of Peter Ryan.

On December 13, 1983, Shorb learned from defendant's arrest record that defendant had been arrested three years earlier for bookmaking activities at 1120 North Flores Street, Apartment #8, West Hollywood. Shorb obtained a booking photo of defendant from the prior arrest.

On December 15, 1983, Officers Shorb and Wyeth went to 1120 North Flores Street, West Hollywood, a 28-unit apartment building with a subterranean garage. The officers entered the garage and conducted a search of the communal trash bin, which measured approximately 8'x4'x5', and was filled to capacity. Upon reaching the bottom half of the bin, Shorb discovered a brown paper shopping bag with mail addressed to defendant, but not to Peter Ryan, at 1120 North Flores Street, Apartment #8, West Hollywood, the address obtained from the telephone company and defendant's arrest record. The bag also contained pieces of paper with "sports wagers, pays and owes, and a tally sheet of wagers on professional football teams. . . ."

While conducting a surveillance of the apartment building on December 26,

1983, Shorb saw a male caucasian, whom he recognized from the booking photograph to be defendant, drive into the subterranean garage and enter apartment #8. Shorb observed apartment #8 for approximately one hour, during which time no one entered or left. This occurred on the Friday afternoon before a weekend when numerous professional football games were to be played.

Subsequently, Shorb dialed the telephone number that was given to him by the informant and which the telephone company told him was listed to apartment #8, and overheard a telephone conversation between the informant and an unknown male. The informant asked, "'What's the latest line?,'" to which the unknown male responded with the latest point spreads on professional football games.

Both Officers Shorb and Wyeth had prior experience in bookmaking investigations and arrests, from which they formed the opinion that defendant was operating a bookmaking office at the apartment. Based on Shorb's supporting affidavit which detailed the above information, a search warrant issued authorizing a search of defendant's apartment. The record on appeal contains no details of the search, the items seized, or defendant's arrest.

Defendant moved to quash the search warrant and to exclude evidence (§ 1538.5). In granting his motion, the magistrate stated that the betting markers and paraphernalia found in the warrantless search of the trash bin were the fruits of an invalid search. The magistrate concluded that the other evidence corroborating the informant's

tip -- the telephone conversation concerning the latest line and defendant's prior arrest for bookmaking at the same address that was matched to the telephone number provided by the informant -- failed to provide probable cause to support the issuance of the search warrant.

After the superior court granted the prosecution's section 871.5 motion, defendant again moved to quash the search warrant and to suppress evidence (§ 1538.5). At the hearing on defendant's motion, the trial court ordered the search warrant quashed and the evidence suppressed on the ground that the warrantless search of the trash bin constituted an unreasonable search and seizure.

Following the prosecutor's representation that the People would not be able to proceed, the case was dismissed. The prosecution appeals from the order of dismissal.

II

DISCUSSION

The prosecution contends that the warrantless search of the trash can was a valid search under both the federal and state Constitutions, and that the search warrant was properly supported by the existence of probable cause.

A. The Warrantless Search of the Trash Bin

The issue before us is the reasonableness of defendant's expectation of privacy in a bag of trash placed in a communal trash bin located in the apartment's garage, an area accessible to the public. First, we note that the mere

fact that the trash bin was located in an area accessible to the public is not dispositive of the issue. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (Katz v. United States (1967) 389 U.S. 347, 351-352.)

With respect to the validity of trash can searches, our Supreme Court has stated that the "secondary degree of protection [that] applies to automobiles . . . also appears to apply to a trash can placed by the curb for the disposal of its contents . . . ." (People v. Dumas (1973) 9 Cal.3d 871, 882, fn. 9.) An Automobile

"may be searched upon probable cause and upon a showing that 'delay would enhance the possibility the articles would be destroyed or placed beyond the reach of the officers. [Fn. omitted.]'" (People v. Parker (1974) 44 Cal.App.3d 222, 229.) In Dumas, the court noted that it would be anomalous to hold that a trash can next to a house may not be searched "but that an automobile parked immediately adjacent to it is subject to such a search, inasmuch as an automobile undeniably evokes at least as great an an expectation of owner privacy as a trash can." (People v. Dumas, supra, 9 Cal.3d at p. 884.)

Under California law, trash placed in a trash can in one's back yard or in front of one's house where it can be collected is not abandoned property outside the scope of protection of the

Constitution. In People v. Edwards (1969) 71 Cal.2d 1096, our Supreme Court held that trash placed in a trash can located in the defendant's back yard was not abandoned, and thus not placed beyond the protection of the Fourth Amendment and article I, section 19, of the California Constitution. (Id., at pp. 1104-1105.) As stated in Edwards: "The marijuana itself was not visible without 'rummaging' in the receptacle. So far as appears defendants alone resided at the house. In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case. We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse

and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere." (Id., at p. 1104.)

And in People v. Krivda (1971) 5 Cal.3d 357, our Supreme Court held that a trash can placed in front of the defendant's house for collection of its contents was not abandoned property placed beyond the protection of the Fourth Amendment and the state Constitution.[2/] While it may be reasonable to anticipate that nonpolice third persons may rummage through and scavenge from one's trash barrels despite local ordinances prohibiting such behavior the probability

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2. The United States Supreme Court vacated and remanded Krivda, to inquire as to whether the decision was based on federal or state constitutional grounds. (California v. Krivda (1972) 409 U.S. 33.) The court's opinion on remand (People v. Krivda (1973) 8 Cal.3d 623) adopted both federal and state constitutional grounds.

of that occurrence does not not necessarily create the same expectation that police would rummage through and retrieve evidence from one's trash barrels without a search warrant. (People v. Krivda, supra, 5 Cal. 3d at pp. 366-367.) The court expressed a concern against "encourag[ing] a practice whereby our citizens' trash can could be made the subject of police inspection without the protection of applying for and securing a search warrant." (People v. Krivda, supra, 5 Cal.3d at p. 367.)

While it appears logical to conclude that a tenant who places trash in a communal trash bin possesses less of a privacy expectation than one who places trash in a privately owned trash can such as in Edwards and Krivda, we are not prepared to adopt an "open fields" rule for communal trash bins, thereby eliminating the need for any particular showing of cause. (See Hester v. United States (1924) 265 U.S. 57, 58-59; People

v. Dumas, supra, 9 Cal.3d at p. 882.) Our position is supported by other appellate decisions concerning communal trash bin searches that have not distinguished Krivda solely on the difference between privately owned trash cans and communal trash bins. (People v. Parker, supra, 44 Cal.App.3d 222; People v. Stewart (1973) 34 Cal.App.3d 695.)

The court in Stewart recognized the logic of concluding that an apartment house tenant who uses communal trash bins has less reason to believe what he deposits will remain

private than does a resident of a single fami dwelling using a privately owned trash can. (Id., at p. 700.)[3] But Stewart recognized th "what further distinguishes [Stewart] from Krivda, however, is the fact that police here had probable cause to believe the trash cans contained evidence of a crime." (Ibid.) Krivda "did not preclude the possibility that a warrantless search of the trash can would have been valid had probable cause existed to support it." (People v. Dumas, supra, 9 Cal.3d at p. 884.)

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3. We note, however, that the California Supreme Court depublished People v. Smith (1975) 52 Cal.App.3d 514, which stated that "[u]sers of the communal receptacle . . . . have no more reason than the householder [in a single family dwelling] to expect their trash to be examined by police officers." (Id., at p. 522.)

Similarly, the court in Parker upheld the warrantless search of a communal trash bin due to the existence of probable cause. (People v. Parker, supra, 44 Cal.App.3d at p. 229.) The court stated: "We do not believe, however, that [Krivda] thereby intended to draw any hard and fast distinction between trash which is at curbside and that which is still on the exterior premises of an apartment house. Rather, the distinction which the court drew was between 'fishing expeditions' where the officer lacked probable cause to believe the trash can contained contraband and those situations where such probable cause existed, as was the case herein. Again, analogy with the automobile cases is helpful. Searches of vehicles have been upheld not only where the vehicle was in transit on the highway, but where it was parked at a curb, adjacent to or far from the defendant's home, and even when it was parked in a common garage

area of the defendant's apartment. [Citation.] Parallel reasoning requires a similar result to apply to trash in a common receptacle adjacent to a large apartment." (People v. Parker, supra, 44 Cal.App.3d at p. 231.)

We agree with Stewart and Parker that the rationale cited for relaxing the warrant requirement for automobile searches applies to communal trash bin searches. As stated by the court in Parker: "Materials placed in trash cans, being placed there for removal and disposal, are highly portable. While trash is typically removed on a specific ascertainable day and within certain circumscribed hours, it is just as typically not subject to the security precautions people normally take with respect to property they intend to keep. Trash placed in a common receptacle used by multiple apartment dwellers is

especially likely to be tampered with. Trespassory incursions into exterior trash receptacles by human and animal foragers, although unwelcome are not totally unexpected. People normally do not take particular pains to assure that the contents of their trash bins will not be damaged by the weather and the likelihood of weather damage is increased when many people regularly use the receptacle." (People v. Parker, supra, 44 Cal.App.3d at p. 230.) Because the characteristics of trash receptacles are those "which diminish the reasonable expectation of privacy as to their contents and make it impractical to obtain a warrant, minimal additional circumstances need be shown by

the People in any particular case to justify their dispensing with a warrant." (Ibid.)

We now consider the validity of these decisions in light of the California Supreme Court's conclusion that article I, section 28, subdivision (d), of the state Constitution, the "Truth in Evidence" provision of the Victim's Bill of Rights (Proposition 8), abrogates "a defendant's right to object to and suppress evidence seized in violation of the California but not the federal, Constitution." (In re Lance W. (1985) 37 Cal.3d 873, 879.) While various federal courts have held that trash placed in an area where it can be collected is abandoned property that it not protected by the Fourth Amendment, those decisions are not binding on this

court since the United States Supreme Court has never squarely ruled on the issue. (See United States v. Sumpter (8th Cir. 1982) 669 F.2d 1215, 1221; United States v. Vahalik (5th Cir. 1979) 606 F.2d 99, 100-101; United States v. Shelby (7th Cir. 1978) 573 F.2d 971, 973-974; United States v. Crowell (4th Cir. 1978) 586 F.2d 1020, 1024-1025; Magda v. Benson (6th Cir. 1976) 536 F. 2d 111, 112-113; United States v. Mustone (1st Cir. 1972) 469 F.2d 970, 972; United States v. Dzialak (2d Cir. 1971) 441 F.2d 212, 215; United States v. Minker (3d Cir. 1962) 312 F.2d 632, 634-635.)

Because Edwards and Krivda are based on both federal and state constitutional provisions, we find them to be valid and binding authority that

this court must follow until either the California or United States Supreme Court rules on the issue. Since the search of the trash bin was without a warrant, the burden was on the prosecution to show proper justification. (People v. Edwards, supra, 71 Cal.2d at p. 1099.)

The prosecution contends that the trash was abandoned and hence fell outside the protection of the Fourth Amendment when it was placed in the communal trash bin. (Abel v. United States (1960) 362 U.S. 217.) In Abel, officers arrested defendant in his hotel room and waited while defendant packed his bags and checked out of the hotel. Defendant left behind certain items in the waste basket in the hotel room. Abel held that it was not "unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with

crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were bona vacantia. There can be nothing unlawful in the Government's appropriation of such abandoned property." (Id., at p. 241.)

We distinguish Abel on its facts. Abel simply held that a defendant, after checking out of a hotel, retained no privacy expectation in the trash he left behind in the hotel room trash can. In the case at bench, the items were not left behind in a vacated hotel room as in Abel, but were placed in a trash bin in the garage of an apartment building. Under the line of California cases which classsifies trash cans under the secondary level of protection applicable to automobiles in determining Fourth Amendment search and

and seizure issues (see People v. Dumas, supra, 9 Cal.3d at p. 882, fn. 9), the burden rested on the prosecution to show that the trash had been abandoned under the facts of the case, or to show that the officers had probable cause to believe that the trash bin contained contraband. (See People v. Superior Court (1972) 23 Cal.App.3d 1004, which held the defendant had abandoned her trash bag by placing it in her neighbor's garbage can, thereby forsaking any reasonable expectation of privacy as to its contents.)

Here, the prosecution made no factual showing that the trash in the bin hand been abandoned. The placement of one's trash in a communal bin in the subterranean garage of one's apartment building is not necessarily an abandonment of one's trash to the police or general

public. As our Supreme Court stated in Krivda: "[H]ad defendants simply cast their trash onto the sidewalk for anyone to pick over and cart away, we would have no difficulty finding that defendants had thereby forsaken any reasonable expectation of privacy with respect thereto. (Fn. omitted.]" (5 Cal.3d at pp. 365-366.) But the existence of many municipal "ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated" (ibid.), would appear to refute the view that the contents of one's trash bags in the trash bins become public property when placed in the bin for collection.

However, we disagree with defendant's argument that he had a heightened expectation of privacy in the trash bin because it was located within the "curtilage" of his apartment. People v. Terry

(1964) 61 Cal.2d 137, 152-153, provides contrary authority. In Terry, police officers observed what appeared to be a marijuana cigarette on the dashboard of the defendant's car. Like the trash bin herein, the automobile in Terry was located in the subterranean garage of the defendant's apartment building. In upholding the warrantless search of the car due to the existence of probable cause, Terry stated, "Apparently the apartment garage was a common area; the officers did not commit a trespass by entering it." (Id., at p. 152.) In People v. Dumas, supra, 9 Cal.3d 871, our Supreme Court noted that the police in Krivda, unlike in Terry, lacked probable cause to justify the warrantless search. "Krivda . . . did not preclude the possibility that a warrantless search of the trash can would have been valid had

probable cause existed to support it. In this light, no conflict with Terry appears, and it is clear that an automobile does not become immune from the Carrol [v. United States (1925) 267 U.S. 132] rule permitting warrantless search simply because it is parked on or near a defendant's premises. [Citation.]" (Id., at p. 884.)

In the instant case, the trash at issue was not in plain view, but was located halfway down in the trash bin, in a paper bag. The contents of the bag were not visible without emptying or searching through the bin and the bag. The fact that the bag was "commingled" with a quantity of trash belonging to others, does not distinguish Edwards, because the bag's contents "had [not] lost its identity and meaning by becoming part of a large conglomeration of trash

elsewhere." (People v. Edwards, supra, 71 Cal.2d at p. 1104.)

At the time of their search of the trash bin, the officers had only the hearsay information provided by the informant coupled with the knowledge that the telephone number was registered to a Peter Ryan at the same address where defendant had been arrested for bookmaking three years before. Because there is nothing in the record to show that the informant was a citizen informant who was either a victim or a witness of a crime, other than the officer's conclusory use of the term "citizen informant," there must have been some corroboration of the informant's tip in order for there to have been probable cause. (See People v. Smith (1976) 17 Cal.3d 845, 852.) We find that the record is insufficient to establish the probability that evidence

of bookmaking would be found in the trash bin. Had the police waited to search the trash bin until after they observed the defendant entering the apartment and after they overheard the telephone conversation concerning the point spreads, we would reach a different result.

B. The Search Warrant is Supported by Probable Cause, Even Excluding the Items Seized from the Trash Bin

The standard by which a magistrate must determine the existence of probable cause for the issuance of a search warrant was explained in Illinois v. Gates (1983) 462 U.S. 213, 235, as follows: "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's

decision. While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' [Citations.]"

With respect to the test for determining the credibility of anonymous informants and the accuracy of their information, Gates abandoned the two-pronged test established by Aguilar v. Texas (1964) 378 U.S. 108, and Spinelli v. United States (1969) 393 U.S. 410, and adopted a test based on the totality of the circumstances. Gates provides: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . .

including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. [Citation.]" (Illinois v. Gates, supra, 462 U.S. at pp. 238-239.) The court repeated its often quoted statement: "A magistrate's 'determination or probable cause should be paid great deference by reviewing courts.' [Citation.]" (Id., at p. 236.)

We find that the search warrant authorizing the search of defendant's apartment was properly supported by probable cause. Viewing the evidence as a whole, we conclude that sufficient

evidence existed to determine a significant probability that evidence of bookmaking would be found in the apartment, even excluding the items seized from the trash bin.

A review of the facts in Gates is helpful to our determination that probable cause existed herein. In Gates, the police received an anonymous letter detailing the manner in which defendants moved drugs between Florida and Illinois, and predicted a trip on May 3. Police surveillance confirmed such a trip. The court upheld the search warrant, stressing the value of the corroboration of the details of the informant's tip: "The corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he

would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. '[B]ecause an informant is right about some things, he is more probably right about other facts' [citation] -- including the claim regarding the Gateses' illegal activity. This may well not be the type of 'reliability' or 'veracity' necessary to satisfy some views of the 'varacity prong' of Spinelli [v. United States, supra, 393 U.S. 410], but we think it suffices for the practical, common-sense judgment called for in making a probable-cause determination. It is enough, for purposes of assessing probable cause, that '[c]orroboration through other sources of information reduced the chances of a reckless of prevaricating tale,' thus providing 'a substantial basis for crediting

the hearsay.' [Citation.]" (Illinois v. Gates, supra, 462 U.S. at pp. 244-245.)

In the case at bench, the informant's tip was corroborated in significant part through independent police investigation. First, defendant's police record showed that he had previously been arrested for bookmaking activities at apartment #8, the same apartment that was registered with the telephone company for the number provided by the informant. While defendant contends that People v. Chapman (1984) 36 Cal.3d 98, prohibits the police from using telephone company records to obtain the names and addresses of customers with unlisted telephone numbers, we find that there was a Fourth Amendment violation here. As a consequence of Lance W., the police did not need a warrant to obtain the address from the

telephone company. Chapman explicitly recognized that such a requirement does not exist under federal law, citing Smith v. Maryland (1979) 442 U.S. 735. (People v. Chapman, supra, 36 Cal.3d at 107, fn. 6; see People v. Lissauer (1985) 169 Cal.App.3d 413.) In addition, defendant cannot complain of the inevitable discovery of the address through his arrest record.

Second, the informant's tip that defendant was in "the location" where the telephone was located between certain hours was further corroborated when defendant was seen parking his car in the apartment building and entering apartment #8. Although the telephone and utilities for that apartment were listed in the name of Peter Ryan rather than in defendant's name, Shorb's affidavit states that this is consistent

with the conducting of bookmaking activities at that location.

Moreover, the informant's tip that defendant was taking bets over the telephone for professional football games was partially corroborated when Shorb, who dialed the number provided by the informant and registered to the apartment entered by defendant, overheard a conversation between the informant and an unknown male concerning the point spreads for professional football games.

We are not persuaded by defendant's argument that the fact he was seen entering the apartment during the predicted hours and that the officer overheard a the telephone conversation concerning point spreads do not constitute corroboration because there was nothing criminal about either event. However, the corroboration of an

anonymous informant's tip does not require a showing of criminal activity: "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." (Illinois v. Gates, supra, 462 U.S. at pp. 243-244, fn. 13.) We note that here, as in Gates, the corroborating evidence of "'seemingly innocent activity became suspicious in light of the initial tip.'" (Ibid.)

Our determination of the existence of probable cause for the issuance of the search warrant is not altered even if the incriminating items found in the trash bin are excluded. The other evidence presented by the prosecution are both substantial and independent

evidence that cannot be deemed tainted by any alleged illegality connected with the search of the trash bin.

Accordingly, we reverse the order of dismissal and remand for further proceedings consistent with the views expressed herein.

CERTIFIED FOR PUBLICATION

THOMPSON, J.

We concur:

LILLIE, P. J.

JOHNSON, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PETER ROONEY, Defendant and Appellant.	No. B006936 (Super.Ct. No. A088619) ORDER MODIFYING OPINION

THE COURT:

It is ordered that the opinion in the above entitled matter filed December 13, 1985, be modified in the following respects:

Delete from page 23, lines 13, 14 and 15 the following:

(Court of Appeal, Second Dist., Filed December 19, 1985, Clay Robbins, Jr., Clerk.)

"We concur:

LILLIE, P. J.

JOHNSON, J."

and substitute therefore the following:

I concur:

JOHNSON, J.

I concur in the judgment only.

LILLIE, P. J.

CERTIFIED FOR PUBLICATION

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CLAY ROBBINS, JR., CLERK

DIVISION: 7

Office of the District Attorney B006936

Richard W. Gerry

849 South Broadway

11th Floor JAN 7 - 1986

Los Angeles, CA 90014

RE: People of the State of Calif.

vs.

Rooney, Peter

2 Criminal B006936

Los Angeles No. A088619

THE COURT:

Petitions for rehearing denied.

I would grant; Lillie, PJ.

O R D E R D E N Y I N G R E V I E W

AFTER JUDGMENT BY THE

COURT OF APPEAL

2nd District, Division 7, No. B006936

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

I N B A N K

==========

PEOPLE

v.

PETER ROONEY

==========

Petitions for review DENIED.

Lucas, J. and Panelli, J., are of the opinion the petition should be granted.

BIRD

Chief Justice

(Supreme Court, Filed March 13, 1986, Laurence P. Gill, Clerk.)

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CLAY ROBBINS, JR., CLERK

DIVISION: 7

Office of the District Attorney B00693

Richard W. Gerry

849 South Broadway

11th Floor

Los Angeles, CA 90014

RE: People of the State of Calif.

vs.

Rooney, Peter MAR 20 1986

2 Criminal B006936

Los Angeles No. A088619

THE COURT: Application for stay of issuance of remittitur is granted.

CERTIFICATE OF SERVICE BY MAIL

Attorney:

IRA REINER
District Attorney of
Los Angeles County
ARNOLD T. GUMINSKI
Deputy District Attorney

849 South Broadway, 11th Floor
Los Angeles, California 90014

No: _____
October Term, 1985

PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed by the County of Los Angeles as a Deputy District Attorney, and I am a member of the Bar of the United States Supreme Court and representing the petitioner herein. My business address is 849 South Broadway, 11th Floor, Los Angeles, California 90014.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICES as follows: By placing three copies in a separate envelope addressed to ARTHUR LEWIS, ESQ., Attorney at Law, 205 South Broadway, Suite 802, Los Angeles, California 90012 (Attorney for Respondent); and by placing one copy in a separate envelope addressed for and to each addressee named as follows:

HONORABLE DAVID N. FITTS
Judge of the Superior Court
West District - Santa Monica
1725 Main Street
Santa Monica, CA 90401

CLERK OF THE COURT OF APPEAL
Second Appellate District
3580 Wilshire Boulevard
Los Angeles, CA 90010

EDWARD T. FOGEL
Assistant Attorney General
State of California
3580 Wilshire Boulevard
Los Angeles, CA 90010

CLERK OF THE SUPREME COURT
State of California
350 McAllister Street
San Francisco, CA 94102

Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at Los Angeles, California, on the 6th day of May, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 6, 1986, at Los Angeles, California.

_____
ARNOLD T. GUMINSKI

Supreme Court, U.S.
FILED
SEP 17 1986
F. SPANIOL, JR.
CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985
No. 85-1835

(7)

CALIFORNIA,

Petitioner,

vs.

PETER ROONEY,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT, DIVISION 7

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and Attorneys for Respondent

36 pp

QUESTIONS PRESENTED

This case deals with the warrantless, non-probable cause, non-consensual, random search of the domestic garbage cans of this great nation - **millions** of garbage cans and bins.

Respondent notes with careful interest that the petitioner, State of California, dichotomizes two distinctly different issues in its first two questions presented:

(a) The issue of **reasonable expectation of privacy** in a domestic garbage can, vis-a-vis

(b) whether there is an "abandonment of property", under property law concepts, when garbage is placed in a trash/garbage can, such that the shallow analyzer is misled to conclude that the protection of the Fourth Amendment "does not apply" to any "abandoned" personal property.

CERTIFICATION AS TO INTERESTED PARTIES

Counsels for the Respondent hereby certifies that ther are no other parties of interest in the case at bar except those listed in the caption and their attorneys of record. These representatives are made to enable judges of the court to evaluate possible disqualifications or recusal.

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RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI 1

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

NO. 85-1835

CALIFORNIA,

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Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT, DIVISION 7

TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the Respondent, PETER ROONEY, by his attorneys ARTHUR LEWIS and ROGER S. HANSON, members of the Bar, United States Supreme Court, and answers the Petition for Cert-

iorari filed by the Attorney General of California which requests review of that certain decision of the Court of Appeals of the State of California for the Second Appellate District entitled **People v. Rooney**, 175 Cal.App.3d 634 (1985), _____ Cal.Rptr._____, decided December 13, 1985.

The Supreme Court of California denied a Petition for Review on March 13, 1986.

This Honorable Court was petitioned for Certiorari by the People of the State of California, and this Court ordered a response.

This Response is filed by attorneys ARTHUR LEWIS and ROGER S. HANSON, and on behalf of the California Attorneys for Criminal Justice, a California statewide defense bar of which Attorneys LEWIS and HANSON are members, on behalf of Respondent PETER ROONEY.

The California Attorneys for Criminal Justice and its Amicus Curiae Brief Committee, chaired by Ephraim Margolin, Esq. of San Francisco, enters key cases in all of the California Courts, the Federal Circuit Courts, and the United States Supreme Court as attorneys Amicus Curiae when it is felt that significant key issues are presented for consequential adjudication.

The issue of **reasonable expectation of privacy in domestic garbage cans**, as opposed to the distinctly different, and erroneous, issue of

abandonment of personal property allegedly supporting no Fourth Amendment right, is an issue of national scope, and one that has been superficially and erroneously decided by the bulk of the United States Circuit Courts, largely because the above dichotomy and distinction has failed to have been recognized .

This case deals with the warrantless, non-probable cause, non-consensual, random search of the domestic garbage cans of this great nation - **millions** of garbage cans and bins.

Respondent notes with careful interest that the petitioner, State of California, dichotomizes two distinctly different issues in its first two questions presented:

(a) The issue of **reasonable expectation of privacy** in a domestic garbage can, vis-a-vis

(b) whether there is an "abandonment of property", under property law concepts, when garbage is placed in a trash/garbage can, such that the shallow analyzer is misled to conclude that the protection of the Fourth Amendment "does not apply" to any "abandoned" personal property.

Respondent, and counsel, urge that certiorari be denied because:

(1) the average citizen overwhelmingly believes that garbage/refuse/rubbage/trash consigned to **any** trash can or a communal trash bin, will be picked up by the duly designated garbage

collectors, and eventually burned/buried/lose its identity/destroyed at a common garbage dump, and that police, or their agents, will not intermediately scrutinize it, examine it, or otherwise investigate it for criminal purposes;

(2) this is a protection that the American citizen is willing to accept, and require, for many tell-tale highly personal articles are disposed of in the American garbage can, all the way from Kotex and Tampons, to used contraceptives (**Griswold v. Connecticut**, 381 U.S. 479) to mail containers that adult films arrive in at the home (**Stanley v. Georgia**, 394 U.S. 557 (1969) to love letters (**United States v. Van Leeuwen**, 397 U.S. 249) to empty vaseline containers, (cf. **Bowers v. Hardwick**, _____ U.S. _____, _____ L.Ed.2d _____, _____ S.Ct. _____ 54 L. W. 4919, (6/30/86) to the flotsam and jetsam of the ebb and flow of life itself, which the typical citizen does not want his police force learning of;

(3) this is a law enforcement technique of very dubious, and, in fact, non-existent value, for "garbage can roulette" can not be statistically optimistic, as the ratio of police to garbage cans must be miniscule, and hence the random search of garbage cans as a means of catching lawbreakers must be mathematically hopeless and overwhelmingly pessimistic;

(4) nothing, and no one, suggests that the **search warrant** should not reach the domestic garbage can should there be probable cause to issue one, and the constitutionally favored road to the search warrant has been immeasurably smoothed of obstacles and impediments with the advent of **Illinois v. Gates** (1983) 462 U.S. 213 supplantation of **Aguilar v. Texas** (1964), 378 U.S. 108 and **Spinelli v. United States** (1969) 393 U.S. 410, and the far-reaching, consequential, and epochal enunciations of **United States v. Leon**, 468 U.S._____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

(5) the manifold and multitude of honest and law-abiding garbage can users should not lose their Fourth Amendment, under their **reasonable expectation of privacy in their personal effects consigned to their garbage can**, solely to allow the relatively di minimis and molecular sized number of non-consensual, non-probable cause, nonconsensual garbage can searches, ultimately generating criminal prosecutions, to become and remain viable; it is a tragic and misplaced incursion on the many to attempt to get at the vanishingly few. In this respect it is to be noted that, in the entire nation, with federal and state cases combined, seemingly only some two dozen "garbage-can" cases have surfaced as reported decisions in the 15 odd years stretching from **California v. Krivda**,

409 U.S. 33 to **California v. Rooney** (1985-1986) (**People v. Rooney**, 175 Cal.App.3rd 634 (1985): thus garbage can cases herald an atomic sized percent of all of the reported cases dealing with the Fourth Amendment to the United States Constitution.

Thus, certiorari is sought on a principle of the Fourth Amendment covering a unique situation that can not statistically aid the nation's law enforcement officers in doing their job -- to bring to justice law breakers -- by making a case against them by the warrantless, non-probable cause, non-consensual search of their garbage can. In fact, this Court would **aid** law enforcement by directing it toward a more fruitful application of their time and monetary resources, rather than the **random search of garbage cans**, with its attending noisome and unpleasant ecological appurtenances, by the rapid denial of certiorari.

Concommitantly, this Court would strike a constitutional blow for logic -- that irrefutable logic is that 999 out of every 1000 United States Citizens now believes, with sound logic, that police will not be grovelling through the nation's garbage like hungry dogs in a random effort to secure some sort of evidence of crime. We emphasize, once again, that this case and this issue is **not** about the right to search a garbage can, supported by a search warrant, nor the **Terry v. Ohio**, 392 U.S. 1, **detention**

of a garbage can to enable police to secure a search warrant, where probable cause exists; the latter is **good** and **intelligent** law enforcement; the issue of this case -- may the nation's garbage cans be routinely and randomly searched without warrant, without probable cause, and without consent, without invading the **reasonable expectation of privacy** of the citizens of this great nation -- is the burning and paramount question for a freedom-loving nation, and a logical and scholarly court.

Certiorari should therefore be denied.

ARGUMENT

THE REASONABLE EXPECTATION OF PRIVACY IN DOMESTIC GARBAGE CANS, TO SUGGEST THAT WARRANTLESS, NON-PROBABLE CAUSE, NON-PERMISSIVE SEARCHES WILL NOT BE MADE OF THEM, IS DISTINCTLY DIFFERENT THAN THE CONCEPT THAT "ABANDONED PERSONAL PROPERTY IS NOT ENTITLED TO PROTECTION UNDER THE FOURTH AMENDMENT." ALL UNITED STATES CIRCUIT COURTS AND SOME STATE COURTS THAT HAVE CONSIDERED THE QUESTION DO NOT FOCUS ON THE CORRECT ISSUE, BUT EMBARK ON THE ERRONEOUS TANGENT OF "ABANDONMENT" OF PERSONAL PROPERTY.

A. Reasonable expectation of privacy is dictated by the fact that only someone with a wild imagination would believe that his daily garbage would possibly be picked over by police like hungry animals in search of food.

We accept the ever-present possibility that 4-legged members of the canine and feline species, rodents, and other scavengers may find intrigue and metabolic sustenance from a noisome garbage can; it is the 2-legged human wearing the police badge that the average American citizen does not

take into account as being interested in searching **his** garbage can.

In modern cities, ordinances usually foreclose the individual **burning** of refuse, and thus its fate is assigned to full-time and highly paid garbage haulers operating with modern and efficient trucks. The average homeowner believes that the fate of his garbage will be a rapid trip to the City dump where it will be buried or burned, and he does not expect that it will be picked over by police.

Thus, the garbage is "abandoned" only to garbage haulers, and not to the world in general, with no concern over what happens to it. The average citizen does not believe or expect, that police will rummage through the intimacies of personal life, be it discarded love letters, used tampons or contraceptives, discarded clothing, or any other similar articles.

In truth, all the citizens who think meaningfully on the subject expect reasonable privacy in the discharged garbage from their life processes.

B. Reasonable expectation of privacy is dictated by sheer statistics that make random, warrantless, non-probable cause, non-consensual searches of garbage cans a non-fruitful law enforcement tool.

The thinking individual is overwhelmed with the fact that the number of garbage cans in this nation overwhelms the available number of police

by many, many orders of magnitude; while the duty of the garbage can remains stalwart, unvarying, and steady -- to receive the refuse of the American home or business, the daily chores of our police vary from running down muggers and thieves to other less exciting activities, leaving very little time for bona fide "garbage can roulette".

It is important to note that the issue is not whether police can search a garbage can with a search warrant when probable cause exists to so do; of course they can and should, and, within the meaning of **United States v. Chadwick,** 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753, and **Robbins v. California**, 453 U.S. 420, if a closed opaque bag within the garbage can is felt to affront the law, we perceive no reason why it can not be reduced to police custody, a warrant obtained for it, and it then be searched.

Thirdly, if it be perceived that the can is about to be whisked away by someone, it may well be that probable cause to believe it then contains contraband may support its immediate search pursuant to the "automobile exception" line of reasoning. **Chambers v. Maroney**, 399 U.S. 42; **Preston v. United States**, 376 U.S. 364; **Carroll v. United States**, 267 U.S. 132.

Finally, of course the can could be searched with **permission** of the owner, much as could a private home.

But it is equally evident that statistics overwhelmingly tell us that **random** or **speculative** search of garbage cans can not be a fruitful police tool.

Therefore, the logical thinker would expect privacy in **his** garbage can, much as the logical individual believes that, statistically, **his** trip on the highway will not end in an automobile accident, and **his** commercial airline flight will not end in death by aircrash.

Essentially then, both police **and** the citizen recognize the high statistical unlikelihood of successful police-contraband contact occurring on a given date, in a given city, by random police searches of garbage cans.

Mathematics dictates a reasonable expectation of privacy.

C. Along the above lines, reasonable expectation of privacy in a garbage can is privacy that society is, and should be, willing to allow; the hue and cry of the Courts hamstringing, tethering, and fettering the police does not make sense in random garbage can searches, and thus no one need feel that an efficient and needed law enforcement tool is being nullified.

D. The many United States Circuit Courts of Appeals which have considered the issue dispose of it on the non-analytical and terse conclusions that the garbage is "abandoned personal property",

and as to this "abandoned" property there can be no affront to the Fourth Amendment rights of its disposer should government agents seize it.

We suggest that such shallow lack of analysis misses the true question:

> "What does the average American Citizen believe will happen to his garbage when he places it out in his garbage can?"

We suggest that this question need not be answered here, for it is obvious what is **not** expected; that is, the police will not be expected to be searching through it for evidence of criminal acts committed by the placer of the garbage.

Respondent must acknowledge that many courts have afforded no reasonable expectation of privacy in garbage under a concept of abandoned personal property, each case presenting a variety of circumstances; **United States v. Crowell**, 586 F. 2d 1021, 1024-1025 (4th Cir. 1978)(police directed private contract trash collectors to turn over trash which had been collected from within defendant's **residence**; trash collectors "had no permission" to do this; the Court observed: "While most people probably expect that their garbage will **not** be inspected but rather will be taken to the dump, it is equally true that most people have no clear understanding of what happens to their garbage when it is removed from their premises and have even less

expectation of having anything further to do with it once it is removed. **The real question is whether there is a reasonable expectation of privacy that one's garbage will not be searched.**" 586 F.2d at 1025) Nonetheless, this Fourth Circuit Panel held that "**abandonment**" as a personal property concept foreclosed any further thoughtful analysis, without answering whether the defendant had reasonable belief that police would not be clandestinely contacting his private service garbage man to enlist his cooperation to effect a search of his closed opaque trash bag. In **Crowell**, supra, apparently police surveillance over a period of time led to the conclusion that a PCP synthesis laboratory was operating on the premises, thus foreclosing any contention that exigent circumstances existed to circumvent securing a search warrant for the home and its then internal garbage bag. The warrantless search of the closed, opaque trash bag, once reduced to police custody, would seem to violate the reasoning of **United States v. Chadwick**, 433 U.S. 1.

In **United States v. Shelby**, 573 F.2d 971, 973 (7th Cir. 1978) the F.B.I. requested the Milwaukee, Wisconsin garbage collectors to turn over closed, opaque bags taken from defendant's garbage cans from behind his home to enable the F.B.I. agents to search these bags for coin wrappers which would evidence that the defendant had been returning to

banks for which he had once been the janitor, via a retained key, and there had pilfered coins. The Seventh Circuit first ruled that the defendant had **standing** to object to the seizure of his garbage bags under the Fourth Amendment (573 F.2d at 973), but ruled that the concept of "abandonment" made any purported reasonable expectation of privacy a "bad judgment" on the part of the defendant. Here it would appear that no exigent cirumstances foreclosed securing a search warrant for the closed, opaque bags, once they were seized, within the reasoning of **United States v. Chadwick**, 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753, as F.B.I. agents received information that the defendant was bringing substantial quantities of coins into local banks and depositing them.

In **Magda v. Benson**, 536 F.2d 111 (6th Cir. 1976), the defendant was suspected of United States post office burglary; surveillance of his home noted the defendant placing his apparently closed, opaque garbage bag on the "tree lawn" next to the street adjacent to his residence. The surveilling postal inspector later retrieved the bag and opened it without a warrant, although its reduction to the postal inspector's custody obviated any contention of "exigency", and allowed the leisurely securing of a warrant pursuant to **United States v. Chadwick**, 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753. The District Judge had

ruled that **People v. Krivda**, 5 Cal.3rd 357, and its "interpretation of the U.S. Constitution by a California Court is not binding on this Court", and that "no legitimate expectation of privacy exists as to **abandoned** property " The Sixth Circuit Agreed.

In **United States v. Mustone**, 469 F.2d 970 (1st Cir. 1972), as early as March 3, 1971, U.S. Secret Service agents believed that the defendants were printing counterfeit money at a location in Lynn, Massachusetts, since they heard "the sound of an offset press in operation" while conducting a surveillance of the premises. Six days later, without securing a search warrant, surveilling U.S. Secret Service officers watched one defendant carrying two large "tied closed" opaque trash bags, and saw them placed on the sidewalk near some garbage cans "several doors away" from their place of operation. The agent seized the bags and took them to the Boston Secret Service office where they were leisurely opened the next day, and agents found impressions of three and one half counterfeit ten dollar notes and three aluminum offset plates stained with green ink. While **People v. Krivda**, 5 Cal.3d 357, was noted, the First Circuit held ". . . we are not persuaded by this authority, however, and hold that when Brennan deposited the bags on the sidewalk he **abandoned** them . . . Implicit in the concept of **abandonment** is a renunciation of any reasonable expectation of privacy in

the property abandoned... The contrary suggestion strikes us as anomalous . . ." (469 F.2d at 927).

This 1972 case, of course, preceded the "closed opaque container, reduced to police custody, requiring a search warrant to enter it" reasoning of **United States v. Chadwick**, 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753.

In **United States v. Minker**, 312 F.2d 632 (3rd Cir. 1962), a wagering case, the defendant was suspected of running a gambling operation in Reading, Pennsylvania. Various "raids" conducted by the government on several of defendant's locations failed to turn up any evidence linking the defendant to the operation, although adding machines, numbers slips, tally sheets, and other indicia of the profession were uncovered. Eventually government agents arranged with one Damore, a trash collector, to permit them to examine the contents of a trash receptacle located on the premises of the defendant's apartment building, used by four tenants and the building superintendent. This step was more fruitful, for "handwriting identified as Minker's" appeared on some of the seized papers, which were leisurely examined off the situs by the agents. The 3rd Circuit held that Minker had "abandoned" this property, although acknowledging that "abandonment was largely a question of intent... and intent, in turn, is a question of fact . . . " The opinion did not disclose whether the paper was lying

in plain view within the communal bin, or was in repose within a closed, opaque bag in the bin.

In **United States v. Dzialak**, 441 F.2d 212 (2d Cir. 1971), company security investigators believed the defendant, a Railway Express employee, was pilfering articles entrusted to him for delivery, and set up a surveillance of his home; agents seized a closed, opaque cardboard box which was part of trash left between the sidewalk and street in front of the home; a second "trash" seizure occurred a week later. Each revealed incriminating evidence of articles shipped by Railway Express and apparently being diverted to the defendant's personal gain. While noting that local municipal ordinances precluded such rummaging into trash, the Second Circuit asserted that it was not "persuaded", because it was, to them. "abundantly clear that Dzialak **abandoned** the property", relying on **Abel v. United States**, 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960).

Of course, like many of the Federal Circuit cases, the seizure of the closed, opaque, cardboard box, and its reduction to police custody, with no inquiry whether a search warrant should be sought, preceded the analysis of **United States v. Chadwick**, 433 U.S. 1 and **Arkansas v. Sanders**, 442 U.S. 753.

Dzialak, of course, does not present the traditional Fourth Amendment problem since the **seizure** was by non-state, non-governmental agents, and is clearly thus distinguishable. Note, **U.S. v. Kahan**, 350 F.Supp. 784, 796, in this respect.

In **United States v. Kahan**, 350 F. Supp. 784 (D.C.S.D.N.Y. 1972), a much more thoughtful and scholarly analysis surfaced, rather than a resort to the facile and shallow "abandonment" route. There a government employee was suspected of criminal activity and his personal waste-basket, cached beneath his desk, was steadily and daily searched for whatever could be found to substantiate generation of federal criminal charges. The Court initially held that there were, indeed, searches, which the Fourth Amendment recognized, occurring, and nothing could support exigent circumstances to obviate getting a warrant, since they were done repetitively. (350 F.Supp. at 781, paragraph (5)).

Secondly, the Court held that Kahan's supervisor could not consent to the search of Kahan's wastebasket (350 F.Supp. at 793794), since Kahan had exclusive and personal use of the waste basket (cf. **United States v. Blok**, 188 F. 2d 1019, 88 U.S. App.D.C. 326 (D.C. Cir. 1951) where supervisor could not consent to search of government employee's desk).

The third issue was, and is, the omnipresent and ubiquitous "cop-out" of **abandonment** of anything deposited in the waste basket from the law of personal property.

The district judge, with uncommon erudition on the concept of "abandonment", characterized the issue thusly:

> " . . . the question is not whether there has been abandonment in the property law sense compare **Jones v. United States**, 362 U.S. 251, 265-267, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) with **Katz**, supra, 389 U.S. at 351-352, 88 S.Ct. 507, **but rather whether there has been abandonment of a reasonable expectation of privacy as to the area searched or the property seized** . . ." (350 F.Supp. 784 at 795).

The Court then proceeds to the nub of the entire garbage can search problem:

> "From this perspective, the flaw in the government's argument becomes immediately apparent. When Mr. Kahan threw papers in his wastebasket, he did "abandon" them **in the sense that he demonstrated an unequivocal intention to part with them forever.** However, **the undisputable expectation of an employee who discards items in his own wastebasket is that they subsequently will be**

disposed of and destroyed without prior inspection by others. In this respect, a wastebasket serves a similar function as the mails -- a wastebasket is a vehicle for destroying objects; a mailed package is a vehicle for sending them to someone else. In each case, the objects leave the possession of the person, **but his expectation that the vehicle in which they have been placed will be free from unreasonable governmental searches remains the same . . .**"

It has, of course, been held by this Honorable Court that a person does not give up his expectation of privacy with respect to letters and sealed packages when he deposits them in the mail. **United States v. Van Leeuwen**, 397 U.S. 249, 251-252, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970).

The Court noted, again with uncommon prescience, that

" . . . there is and can be no claim that Mr. Kahan's **wastebasket** was abandoned by him when he left his office in the evening after work. So long as he remained an employee with an assigned desk under which lay a wastebasket for his exclusive use, whether he was actually in the office at any particular time could not possibly affect his expectation of privacy with respect

to that receptacle . . ." (350 F.Supp. at 797).

Thus, by analogy, the only vessel possible for disposal of Mr. Rooney's trash, the apartment house dumpster, is not "abandoned" by Rooney nor any other user, and the concept of personal property "abandonment" totally misses the significant correct issue:

> "Does the depositor of trash give up, or abandon, his reasonable belief that the trash he places within the non-abandoned trash bin or container will not be scrutinized by police, or others at police direction, and does he still have the **reasonable expectation of privacy** in the ultimate fate of the trash, albeit the trash is abandoned in the personal property sense?"

Since Peter Rooney is, and was, an assigned user of the common **dumpster** for the apartment complex, he obviously has **standing** to object to its warrantless search.

The **Kahan** judge notes that, as we do,

> "Where the government believes that criminal prosecution of an employee is warranted, presumably it will have **probable cause** to believe that the employee has committed, or is committing a crime. In that case, if it has probable cause to conduct a Fourth Amendment search or seizure to obtain evidence of crime, **it can follow the**

warrant procedure..." (350 F.Supp. at 798).

Thus **Kahan** presents an uncommonly searching and scholarly analysis of the **true** issue of garbage can searches:

It is not the abandonment of the **trash** in the personal property sense that is at issue; indeed, the true issue is what does the American citizen reasonably believe will be the true fate of his trash, **which he has abandoned in the personal property sense, but not in the reasonable expectation of privacy sense?**

The distinction is, of course, the turning point and the key to erudite and correct analysis, and **scholarly decision**, as opposed to a facile, truncated, circumvented and shallow analysis, and **wrong decision.**

Virtually all cases which approve garbage can searches do so on the non-analytical launch-pad, and point of take-off, and route to cloudy thinking, that there is no "reasonable expectation of privacy" in "abandoned" personal property.

Such a path, urged by the State of California, sorely points out the dichotomy necessary for proper perspective of the "garbage can" search issue of the United States Constitution's Fourth Amendment.

The Supreme Court of California has, of course, recognized that California citizens have, and **believe** that they have, a **reasonable expectation of privacy** in domestic garbage cans; **People v. Edwards**, 71 Cal.2d 1096; **People v. Krivda**, 5 Cal.3d 357; This reasonable expectation of privacy is based on the reasonable belief that domestic garbage can contents will be picked up by either private or municipal garbage haulers, and will not be picked over/searched by police, or by police in cooperation with the licensed garbage haulers. The reasonable belief is that the contents of a domestic garbage can will be taken to a garbage dump where it will be burned/buried/mixed with other trash and become indistinguishable. The test, pursuant to **Katz v. United States**, 389 U.S. 347 is "whether the person has exhibited a reasonable expectation of privacy and, if so, whether that expectation has been violated by unreasonable governmental intrusion . . ."

". . . The prohibition in the 4th Amendment is against unreasonable searches and seizures, not trespasses . . . what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected" 389 U.S. 347, 351-352

as the California High Court reasoned, with logic,

> ". . . The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public... Under such circumstances, we hold that defendants had a reasonable expectation that their trash would not be rummaged through and picked over by police officers acting without a search warrant . . ." (65 Cal.3d 357, 366-367).

Said again, a homeowner/business may "abandon" trash/refuse/garbage, but this "abandonment" is to garbage haulers who are not to be expected to be in liaison with police, and cooperating to allow police scrutiny of the average garbage can's contents.

That contents is usually, itself, contained in closed, opaque bags/containers, which, if thought to offend the law, may be reduced to police custody and a warrant sought.

In fact, the reasoning of **United States v. Chadwick**, 433 U.S. 1, **Arkansas v. Sanders**, 442 U.S. 753, and **Robbins v. California**, 453 U.S. 420 suggest that a reduction of the closed, opaque, brown garbage container found within the trash receptacle to police custody commands the securing of a warrant to enter it.

In the case at bar, respondent PETER ROONEY had placed his refuse within a brown, opaque, closed bag in the common trash bin, which was opened by the police to effect identification of its contents, and to identify ROONEY as the likely owner/contributor of the contents. That being the case, there is little that can be said in support of obviation of the warrant process.

CONCLUSION

Certiorari should be denied, because there is a reasonable expectation of privacy in domestic garbage cans, and warrantless, non-probable cause, non-consensual searches should not be sanctioned on the misguided theory that "abandoned" personal property leaves no Fourth Amendment protection to the once-owner of the garbage.

The reasonable expectation of privacy suggests that the citizen "abandons" his garbage solely and only to the garbage man, who is believed to be neither a police agent nor someone who will cooperate with scavenging police in a warrantless, non-probable cause, non-consensual search of a garbage can, closed opaque garbage bags either within or without the garbage can, its displaced and covered contents, or any other garbage can appurtenance.

Certiorari should be denied.

Respectfully and
logically submitted,

ARTHUR LEWIS, ESQ.

AND

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AND

CALIFORNIA ATTORNEYS
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STATEMENT OF RELATED CASES

Pursuant to Rules of the United States Supreme Court, Respondent knows of no cases that are related to this appeal which are now pending before this court.

DATED: September 5, 1986.

ROGER S. HANSON, ESQ.
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PROOF OF SERVICE

STATE OF CALIFORNIA)

) ss:

COUNTY OF RIVERSIDE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 7131 Mission Boulevard, Riverside, California 92509.

On September , 1986, I served the within RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI on the interested parties in said action by placing true copies in sealed envelopes with postage thereon fully prepaid in the United States mail at San Bernardino, California, addressed as follows:

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I certify under penalty of perjury that the foregoing is true and correct.

EXECUTED on September , 1986 at Riverside, California.

JACK GALLAGHER

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1835

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 6, 1986
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EDITOR'S NOTE

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CHRONOLOGY

1984

Jan 17 — Search warrant, authorizing search of respondent's residence, issued.

Jan 31 — Felony complaint No. A088619, charging respondent in five counts with bookmaking offenses, is filed in the Municipal Court of Beverly Hills Judicial District, County of Los Angeles.

April 12 — Hearing on motion to quash the search warrant, pursuant to California Penal Code Section 1538.5, conducted before magistrate in Municipal Court of Beverly Hills Judicial District. Magistrate grants motion to quash search warrant on its face, and dismisses the criminal action against

respondent after People represent they would be unable to proceed.

April 19 People file notice of motion and motion to reinstate the felony complaint, pursuant to California Penal Code Section 871.5, in the Superior Court of the State of California, County of Los Angeles.

May 2 People file memorandum of points and authorities in opposition to quashing search warrant and in support of reinstatement of the complaint under Penal Code Section 871.5

May 15 Respondent files response to People's memorandum of points and authorities.

May 16 Hearing in Superior Court for Los Angeles County, at the conclusion of which the People's

motion to reinstate the complaint is granted. Respondent waives his right to a preliminary hearing. It is stipulated that respondent be bound over to Superior Court and that the information be deemed filed that date with the same charges as on the complaint. Respondent is arraigned and pleads not guilty, and trial date is set.

May 24 Respondent files notice of motion, motion to suppress evidence under California Penal Code Section 1538.5, and motion to quash search warrant.

June 6 Suppression hearing in Superior Court for Los Angeles County. Suppression motion is granted and the criminal action against

respondent is dismissed after People represent they are unable to proceed.

July 26 — People file notice of appeal from order of June 6, 1986 suppressing evidence and dismissing the action.

Sep 20 — Record on appeal received by Court of Appeal.

Dec 17 — Appellant's opening brief filed by People in the Court of Appeal of the State of California Second Appellate District, Division Seven.

1985

May 3 — Respondent's reply brief filed.

July 1 — Respondent's supplemental memorandum of points and authorities filed.

July 16 People's response to respondent's supplemental memorandum of points and authorities filed.

Sep 5 Argument waived and submitted before the Court of Appeal.

Dec 13 Opinion and judgment of Court of Appeal filed.

Dec 19 Order modifying opinion filed by Court of Appeal.

Dec 26 Respondent's petition for rehearing filed.

Dec 30 People's petition for rehearing or modification of opinion filed.

1986

Jan 7 Petitions for rehearing denied by Court of Appeal.

Jan 22 People's petition for review filed in the California Supreme Court.

Jan 22	Respondent's petition for review filed in the California Supreme Court.
Mar 13	California Supreme Court denies petitions for review.
Mar 19	Application for stay of issuance of remittitur and request for immediate stay filed by petitioner in Court of Appeal.
Mar 20	Application for stay of issuance of remittitur is granted by the Court of Appeal.
May 6	Petition for writ of certiorari filed in the Supreme Court of the United States.
Oct 14	Certiorari granted.

Search Warrant No.

STATE OF CALIFORNIA [Receipt

COUNTY OF LOS ANGELES stamp

SEARCH WARRANT omitted]

PEOPLE OF THE STATE OF CALIFORNIA

to any sheriff, policeman or peace officer in the County of Los Angeles:

PROOF, by affidavit, having been made before me by

RAY E. SHORB, #20653 that there is
(name of affiant)
probable cause to believe that the property described herein may be found at the locations set forth herein and that it is seizable pursuant to Penal Code Section 1524 as indicated below of "x"(s) in that it:

____ was stolen or embezzled

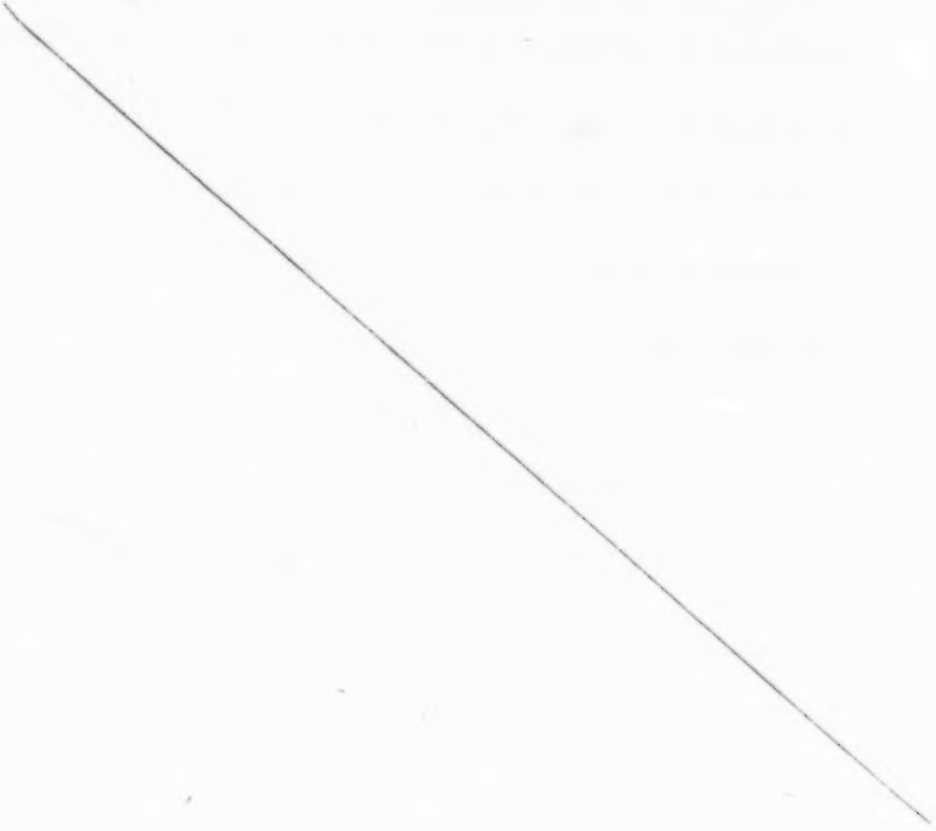
__x__ was used as the means of committing a felony

__x__ is possessed by a person with the intent to use it as a means of

committing a public offense or is possessed by another to whom he may have delivered it for the purpose of concealing it or preventing discovery

__x__ is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

you are therefore COMMANDED TO SEARCH



LOCATION TO BE SEARCHED

1120 North Flores Street, Apartment #8, West Hollywood, California. The premises at 1120 North Flores Street, apartment #8, West Hollywood, California, in the County of Los Angeles is described as a two story multi-unit apartment building tan stucco wtih brown wood trim. There are red brick steps leading up to the lobby area and a driveway leading to a subterranean garage. The numerals "1120" are white and located over the driveway (posted on the apartment building). Apartment number 8 is located on the second floor northwest end of the building. The numeral "8" is posted on the front (only) door of the location. Included are any storage rooms or compartments assigned to apartment number 8.

for the following property: In the County of Los Angeles, there is now being concealed therein certain property, namely bookmaking paraphernalia including, but not limited to, football cards, football stubs, owe sheets, owe markers, pay and owe sheets, pat sheets, pay markers, copies of sporting publications copies of National Daily Reporters, ledger books, disposable papers, sponges, time pieces, pencils, radios, pens, two-way communicaton systems, adding machines, adding machine tapes, telephones, record-ations of bet and bettors, telephone number and address books, printing or duplicator machine, articles of personal property tending to establish the identity of persons in control of the locations where bookmaking paraphernalia is found, consisting in part and including, but not limited to, utility company receipts,

diaries, telephone directories, rent documents or other papers bearing names thereon. Also, searching officers request authorization to answer the telephone, converse with callers who appear to be calling in regard to bookmaking, and record the conversation without revealing their true identity.

and to SEIZE it if found and bring it forthwith before me, or this court, at the courthouse of this court.

GIVEN under my hand and dated this 17th day of January, 1984 at 3:45 p.m.

/s/ Nancy Brown

Signature of Magistrate

Judge of the Municipal Court Los Angeles Judicial District

[inapplicable matter omitted]

Search Warrant No.

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

AFFIDAVIT FOR SEARCH WARRANT

RAY E. SHORB, #20653 , being sworn, says
(name of affiant)
that on the basis of the information contained within this affidavit, he has probable cause to believe and does believe that the property described below is seizable pursuant to Penal Code Section 1524 in that it: (CHECK APPROPRIATE BOX OR BOXES)

____ was stolen or embezzled

__x__ was used as the means of committing a felony

__x__ is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he may

have delivered it for the purpose of concealing it or preventing its discovery

__x__ is evidence which tends to show that a felony has been committed or a particular person has committed a felony;

and that he has probable cause to believe and does believe that the described property is now located at and will be found at the locations set forth below and thus requests the issuance of a WARRANT TO SEARCH

LOCATION TO BE SEARCHED

1120 North Flores Street, Apartment #8, West Hollywood, California. The premises at 1120 North Flores Street, apartment #8, West Hollywood, California, in the County of Los Angeles is described as a two story multi-unit apartment building tan stucco wtih brown wood trim. There are red brick steps leading up to the lobby area and a driveway leading to a subterranean garage. The numerals "1120" are white and located over the driveway (posted on the apartment building). Apartment number 8 is located on the second floor northwest end of the building. The numeral "8" is posted on the front (only) door of the location. Included are any storage rooms or compartments assigned to apartment number 8.

for the following property: In the County of Los Angeles, there is now being concealed therein certain property, namely bookmaking paraphernalia incuding, but not limited to, football cards, football stubs, owe sheets, owe markers, pay and owe sheets, pat sheets, pay markers, copies of sporting publications, copies of National Daily Reporters, ledger books, disposable papers, sponges, time pieces, pencils, radios, pens, two-way communication systems, adding machines, adding machine tapes, telephones, recordations of bet and bettors, telephone number and address books, printing or duplicator machine, articles of personal property

tending to establish the identity of persons in control of the location where bookmaking paraphernalia is found, consisting in part and including, but not limited to, utility company receipts, diaries, telephone directories, rent documents or other papers bearing names thereon. Also, searching officers request authorization to answer the telephone, converse with callers who appear to be calling in regard to bookmaking, and record the conversation without revealing their true identity.

Your affiant says that the facts in support of the issuance of the search warrant are contained in the attached STATEMENT OF PROBABLE CAUSE which is incorporated as if fully set forth herein. Wherefore, your affiant prays that a

search warrant be issued for the seizure of said property or any part thereof, at any time of the day, good cause therefore having been shown.

/s/ Roy E. Shorb

Signature of Affiant

Subscribed and sworn to before me
this 17th day of January, 1984

3 45 p.

/s/ Nancy Brown

Signature of Magistrate

Judge of the Municipal Court Los Angeles Judicial District

[inapplicable matter omitted]

AFFIANT: RAY E. SHORB, #20653

Your affiant is currently assigned to Hollywood Area Vice investigating book-making activity within the Hollywood Area.

On December 3, 1983, at approximately 1330 hours, your affiant was contacted by a citizen informant who stated that Pete Rooney at telephone number 213-656-8430 was accepting wagers on professional football events over the telephone or on an answer machine and is in the location between 1600 hours and 1800 hours.

On December 7, 1983, at approximately 1300 hours, your affiant was able to confirm through Departmental sources that telephone number 213-656-8430 and utilities were listed to 1120 North Flores Street, apartment #8, West Hollywood, with the subscriber as Peter Ryan. On

December 13, 1983, at approximately 1730 hours, your affiant completed a record check on Peter Rooney. The check revealed that Peter Rooney had one prior bookmaking arrest on September 11, 1978 for 337a P.C., Bookmaking, booking number 4950542. The location of arrest was 1120 North Flores Street, apartment #8, West Hollywood. Your affiant through Departmental sources obtained a booking photograph to verify that the person under surveillance was Peter Rooney. On December 15, 1983, at approximately 0230 hours, your affiant and partner Officer Les Wyeth, #17223, drove to 1120 North Flores Street, West Hollywood and walked down the driveway to the apartment trash bin, which is a metal bin approximately 8 feet long by 4 feet wide by 5 feet high and is located in the

subterranean garage at the southeast corner of the apartment building. Your affiant noticed that there was trash spilling out of the trash bin onto the ground. Your affiant and partner Officer Les Wyeth, #17223 searched the trash bin and noticed that there was trash from numerous different apartments co-mingled inside. As your affiant and partner Officer Les Wyeth, #17223, reached the bottom half of the trash bin, your affiant located a brown paper shopping bag with mail addressed to Pete Rooney, 1120 North Flores, #8, Los Angeles. Your affiant removed the bag of trash from the trash bin and recovered letters and a magazine addressed to Pete Rooney, 1120 North Flores, #8, Los Angeles. Also recovered were pieces of paper with sports wagers, pays and owes, and a tally

sheet of wagers on different professional football teams (evidence booked on DR#83-9910022). Your affiant did not observe any mail or papers addressed to Peter Ryan. On December 16, 1983, at approximately 1600 hours, your affiant went to 1120 North Flores Street, apartment #8, West Hollywood and walked by apartment #8. Your affiant observed the curtains open, the apartment to be dark and no movement inside.

On December 16, 1983, at approximately 1615 hours, your affiant and partner Officer Les Wyeth, #17223 placed 1120 North Flores Street, apartment #8, West Hollywood, under surveillance and observed a male caucasian identified as Peter Rooney (from the booking photograph examined by your affiant) drive into the subterranean garage at 1120 North Flores Street, West Hollywood,

exit vehicle, license number 320ZFU and enter apartment #8. It should be noted that December 16, 1983 was a Friday and that there were numerous professional football games being played over the weekend of December 16, 17 and 18, 1983. Your affiant observed apartment #8 for approximately one hour and did not observe anyone else enter or leave.

On December 16, 1983, at approximately 1715 hours, your affiant dialed telephone number 213-656-8430. The telephone rang one time and was answered by an unknown male voice who stated, "hello". Your affiant terminated the telephone call. It should be noted that on December 16, 1983 at 1800 hours, there was a professional football game being played between the New York Jets and Miami Dolphins. It is common knowledge

that wagers are placed within the last hou prior to the start of the game to get the latest line*. It is common knowledge in the bookmaking world that the above actions are consistent with a sports bookmaking operation.

Between December 30, 1983 and January 6, 1984, your affiant dialed telephone number 213-656-8430 and overheard a telephone conversation between a citizen informant and an unknown male. The unknown male answered the telephone on one ring and the citizen informant asked the unknown male, "What's the latest line?" The unknown male returned wtih the latest line on the professional football team games to be played. It is common knowledge in the bookmaking world that the above actions

*Line: Point spread.

are consistent with a sports bookmaking operating.

Your affiant requests the identity of the citizen informant to be kept confidential because your affiant believes that the disclosure of the citizen informants identity will destroy or impair their future usefulness to law enforcement engaged in investigating criminal activity and would subject the informant to great bodily injury or death from those they have informed upon and their associates.

Your affiant has been a police officer for ten years. During this time your affiant has been assigned to Hollywood Vice for the past eight months. Your affiant is presently investigating bookmaking activity within the Hollywood Area and has conducted seven bookmaking

invesitgations culminating in three arrests.

Your affiant's partner Officer Les Wyeth, #17223 has been a police officer for twelve years. During this time your affiant's partner Officer Les Wyeth, #17223 has been assigned to Hollywood Area Vice for the past twelve months. Your affiant's partner is presently investigating bookmaking activity within the Hollywood Area and has conducted an excess of thirty book-making investigations culminating in seventeen arrests.

It is your affiant and partner Officer Les Wyeth's, #17223, opinion that 1120 North Flores Street, apartment #8, West Hollywood, in the County of Los Angeles is operating in the fashion on [sic!] a

**straight-in-back office accepting wagers on professional football games. It is your affiant and partner Officer Les Wyeth's, #17223, opinion that Peter Rooney is the head of the bookmaking operation at that location. It is your affiant and partner Officer Les Wyeth's, #17223, experience that bookmaking activities are

---

**Straight-in-back office: Bookmaking operation, operated as a back office while accepting individual bets from bettors who phone directly into the back office. Back office is a bookmaking location where wagers are permanently kept until settled.

almost always conducted over the telephone. Persons place wagers and request payoffs. Thus, your affiant and partner Officer Les Wyeth, #17223 requests this warrant to contain an authorizaton for officers to answer the telephone within the premises during the search in order to obtain evidence such as wagers being placed and payoffs being requested. It is your affiant and partner Officer Les Wyeth's, #17223, opinion that callers will attempt to place wagers and request payoffs in the telephone coversatons.

2/1/84 - mail

IN THE MUNICIPAL COURT OF BEVERLY HILLS

JUDICIAL DISTRICT

COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. PETER ROONEY, Defendant.

No. A088619

Complaint Felony

[Filing Stamp Omitted]

Personally appeared before me this 30th day of January, 1984 R. Shorb, LAPD Hwd Vice of the County of Los Angeles who, being first duly shown an oath, upon information and belief complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the crime of VIOLATION OF SECTION 337a, SUBDIVISION 1, Penal Code of California, a felony, was committed by

PETER ROONEY

who, at the time and place last aforesaid, did willfully, unlawfully and feloniously engage in poolselling and bookmaking upon the result and purported result of a trial, and purported trial, and contest and purported contest, of skill, speed and power of endurance, to wit, football.

COUNT II

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charge set forth in count one hereof,

complainant further complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the crime of VIOLATION OF SECTION 337a, SUBDIVISION 2, Penal Code of California, a felony, was committed by

PETER ROONEY

who, at the time and place last aforesaid, did willfully, unlawfully and feloniously, for gain, hire, reward, gratuitously and otherwise, keep and occupy apartment located at 1120 N. Flores, #8, W. Hollywwod with a book and books, paper and papers, apparatus, device and paraphernalia, for the purpose of recording and registering a bet and bets, and purported bet and bets, and wager and wagers, and purported wager and wagers, and of selling pools and

purported pools, upon the result and purported result of trial and purported trial, and contest and purported contest, of skill, speed and power of endurance, to wit, football.

COUNT III

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charges set forth in all preceding counts hereof, complainant further complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the Crime of VIOLATION OF SECTION 337a, SUBDIVISION 4, Penal Code of California, a felony, was committed by PETER ROONEY who, at the time

and place last aforesaid, did willfully, unlawfully and feloniously, for gain, hire, reward, gratuitously and otherwise, record and register a bet and bets, and a wager and wagers, upon the result and purported result of a trial and purported trial, and contest and purported contest of skill, speed and power of endurance, to wit, football.

COUNT IV

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charges set forth in all preceding counts hereof, complainant further complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the crime of

VIOLATION OF SECTION 337a, SUBDIVISION 5, Penal Code of California, a felony, was committed by

PETER ROONEY

who, at the time and place last aforesaid, did willfully, unlawfully, feloniously and knowingly, being the owner, lessee and occupant of the premises located at 1120 N. Flores, #8, W. Hollywood permit Peter Rooney to occupy said building and room with a book and books, paper and papers, apparatus, device and paraphernalia for the purpose of recording and registering a bet and bets, and purported bet and bets, and wager and wagers, and purported wager and wagers, and of selling pools and purported pools, upon the result and purported result of trial and purported trial, and contest and purported contest, of skill,

speed and power of endurance, to wit, football.

COUNT V

For a further and separate cause of complaint, being a different offense of the same class of crimes and offenses as the charges set forth in all preceding counts hereof, complainant further complains and says:

That on or about the 22nd day of January, 1984, at and in the County of Los Angeles, State of California, the crime of VIOLATION OF SECTION 337a(6), Penal Code of California, a felony, was committed by PETER ROONEY who did willfully and unlawfully lay, make, offer, and accept a bet and bets, and wager and wagers, upon the result and purported result, of a trial, purported trial, contest, and

purported contest, of skill, speed, and power of endurance, to wit, football.

/s/ Ray Shorb by Les Wyeth

R. Shorb

Subscribed and sworn to before me on January 30, 1984

/s/ [Signature Illegible]

Judge of the above entitled Court

Issued by

ROBERT H. PHILIBOISAN

District Attorney

By

/s/ R. Schuit

ROBERT SCHUIT/rlws Deputy

Bail Recommended

$2,500.00

WITNESSES

LAPS HWD VICE

BEVERLY HILLS AREA OFFICE

Deft: In Custody

CII No. (or other)

CII: 01737874

Bkg: 7437374

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES — DEPT. WEST A

Date MAY 16, 1984

HONORABLE:	
MARIO L. CLINCO	L. EDISON
JUDGE	Deputy Clerk
B. GOVER	M. HOUSE
Deputy Sheriff	Reporter

A 088619 (Parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA	Counsel for People: DEPUTY DISTRICT ATTORNEY J PERRUZZA
VS	
01 ROONEY, PETER	Counsel for Defendant: A LEWIS

(No file available)

NATURE OF PROCEEDINGS PEOPLE'S MOTION TO REINSTATE COMPLAINT UNDER SECTION 871.5 PENAL CODE

People's motion to reinstate the complaint is called for hearing.

Motion is argued and granted.

Defendant waives his right to a preliminary hearing. Defendant furtehr waives his right to confrontation of witness for the purpose of cross-examination.

It is stipulated by and between both sides that the defendant can be bound over to Superior Court. It is further stipulated that the information be deemed filed this date with the same charges as on the complaint.

Defendant is arraigned and pleads not guilty.

Trial is set for June 19, 1984, at 9:00 AM in Department H, possible disposition.

Defendant's motion to be released on his own recognizance is granted. No reason given.

Agreement to appear-Release on own recognizance signed and filed this date.

O.R.

MINUTES ENTERED

DEPT WE A MAY 17 1984

COUNTY CLERK

MINUTE ORDER

ARTHUR LEWIS
Attorney at Law
205 South Broadway, Suite 802
Los Angeles, California 90012
(213) 624-4901
Attorney for Defendant,
PETER ROONEY

[filing stamp omitted]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. PETER ROONEY, Defendant.	Case No. A 088619 NOTICE OF MOTION AND MOTION TO SUPPRESS EVIDENCE UNDER SECTIO 1538.5 OF THE PENAL CODE; (MOTION TO QUAS SEARCH WARRANT)

TO: THE LOS ANGELES DISTRICT ATTORNEY, ROBERT PHILIBOSIAN AND HIS DEPUTIES:

YOU AND EACH OF YOU PLEASE TAKE NOTICE that on June 6, 1984 at 9:00 a.m. or as soon thereafter as the matter may be heard in Department H of the above-entitled court, defendant, Peter Rooney will move for an Order to suppress evidence all tangible or intangible things seized, including but not limited to observations and conversations.

Said motion will be based upon the recent ruling of the California Supreme Court in People v. Chapman Crim. 22776 the other authorities heretofore cited by

defendant in the court below and which points and authorities are contained in the file herein.

DATED: May 22, 1984

/s/ Arthur Lewis

ARTHUR LEWIS

Attorney for Defendant

MEMORANDUM OF POINTS AND AUTHORITIES

It is respectfully submitted that defendant Peter Rooney had a reasonable expectation of privacy in the telephone registered to his location at 1120 North Street, Apartment #8, West Hollywood, California (note declaration of Peter Rooney that he was a subscriber to that telephone under the name of Peter Ryan and that said telephone was non published).

It is submitted that the affidavit in support of the search warrant clearly reflects that the officers (thru departmental facilities) determined that the telephone number given to them by their informant was checked thru departmental facilities and determined to be

registered to Peter Ryan at said address. Absent the securing by the police of the address to which said number was registered, the subsequent investigation would not, could not have been made.

It is respectfully submitted that the securing by the officers of the address to which the telephone was listed "thru departmental sources" was by way of a police request from the Telephone Company for said information. That at the time of the securing of this search warrant this was the standard police practice in matters of this kind. Should there be any question concerning this matter, counsel would then request permission to take testimony thereon.

This is a matter of common knowledge which the District Attorney's office

can, should the same be required, learn by inquiring of their affiant.

It is also respectfully submitted that the trash can search was in violation of Edwards and Krivda, 5 Cal.3d 357 (1971).

This courts review is respectfully requested.

DATED: May 22, 1984

Respectfully sbmitted,

/s/ Arthur Lewis

ARTHUR LEWIS

Attorney for Defendant

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. WE H

Date 6-6-84

HONORABLE:

D. FITTS	M. WHITE
JUDGE	Deputy Clerk
J. JONES	L. ANASTASIOU
Deputy Sheriff	Reporter

A088619 (parties and counsel checked if present)

PEOPLE OF THE STATE OF CALIFORNIA	Counsel for People: DEPUTY DISTRICT ATTORN
ROONEY, PETER	T. MILLER
337a.1 lct	Counsel for Defendant:
337a.2 lct	A . LEWIS

NATURE OF PROCEEDINGS 1538 OR

* * * * *

---

37 /x/ MOTION PURSUANT TO SECTION 1538.5 PENAL CODE CALLED FOR HEARING

* * * * *

44 /x/ Defense 1385 Penal Code Motion granted. People state they are unable to proceed. Trial date of 6-19-84 is advanced and vacated.

* * * * *

46 /x/ MOTION PURSUANT TO SECTION 1538.5 PENAL CODE GRANTED.

* * * * *

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60 /x/ FURTHER ORDER AS FOLLOWS: Case dismissed as indicated box #44.

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* * * * *

* * * * *

* * * * * /x/ O R DISCHARGED * * * * *

MINUTES ENTERED

6-6-84

COUNTY CLERK

MINUTE ORDER

REPORTER'S TRANSCRIPT OF PROCEEDINGS,

SUPERIOR COURT OF LOS ANGELES COUNTY

JUNE 6, 1984; 10:50 AM

DEPARTMENT WEST "H"

HON. DAVID N. FITTS, JUDGE

--000--

(THE DEFENDANT ROONEY BEING PRESENT IN COURT AND REPRESENTED BY COUNSEL, ARTHUR LEWIS, ESQ.; THE PEOPLE OF THE STATE OF CALIFORNIA BEING REPRESENTED BY THOMAS MILLER, DEPUTY DISTRICT ATTORNEY OF LOS ANGELES COUNTY.)

(LORI SUSANNE ANASTASIOU, OFFICIAL REPORTER.

THE COURT: PEOPLE VERSUS PETER ROONEY. DEFENDANT IS PRESENT WITH COUNSEL.

THE MATTER PENDING, MOTION TO SUPPRESS EVIDENCE PURSUANT TO SECTION 1538.5. AT THIS POINT TO CLASSIFY THE ISSUE, IS DIRECTED AT THE SUFFICIENCY OF THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT AND CHALLENGES THAT AFFIDAVIT ON ITS FACE BY REASON OF THE ALLEGATION THAT THE POLICE DEPARTMENT SECURED THE ADDRESS OF AN UNLISTED PHONE NUMBER FROM THE PHONE COMPANY WITHOUT FIRST OBTAINING A WARRANT.

AND THE ARGUMENT WOULD BE THAT WITHOUT THIS INFORMATION, THE INVESTIGATION WOULD HAVE RENDERED THE WARRANT INSUFFICIENT ON ITS FACE.

MR. LEWIS: THAT'S CORRECT, YOUR HONOR, WITH ONE EXCEPTION.

I SUPPOSE, WHAT WE'VE DONE, WE'VE ATTACHED A DECLARATION OF MR. ROONEY INDICATING THAT HE WAS A SUBSCRIBER TO THAT TELEPHONE; THAT HE HAD REQUESTED IT TO BE NON-PUBLISHED OR UNLISTED; THAT HE HAD NOT AUTHORIZED THE [1] TELEPHONE COMPANY TO GIVE OUT ANY INFORMATION CONCERNING THAT NUMBER AND/OR ANYTHING ELSE THAT MIGHT BE REQUIRED IN CONNECTION WITH THE FACT THAT HE IS A SUBSCRIBER TO THE NUMBER AND IT WAS UNLISTED.

I MIGHT ALSO POINT OUT THAT IF -- AND BASED ON SOME CONVERSATION I JUST HAD WITH THE D.A., HE IS NOW INDICATING TO ME FOR THE FIRST TIME IT'S POSSIBLE THAT THEY HAD MR. ROONEY'S ADDRESS FROM THE

INFORMANT.

IT IS NOT CONTAINED WITHIN THE AFFIDAVIT, SO TO THE EXTENT THAT THEY WERE GOING TO DO THAT, I SUPPOSE THAT WOULD REQUIRE SOME ADDITIONAL TESTIMONY IN THE NATURE OF A CONTROVERTING OR --

THE COURT: ALL I WAS TRYING TO DO WAS TO PUT THE ISSUE AS SIMPLY AS POSSIBLE.

MR. LEWIS: YES, I AGREE WITH THE COURT'S STATEMENT OF THE ISSUE.

THE COURT: VERY WELL.

NOW, TO PUT THE POEPLE'S POSITION IN A NUTSHELL.

THEY WOULD UNDOUBTEDLY BE URGING INEVITABLE DISCOVERY, AND THAT'S DISCLOSED BY CERTAIN INFORMATION ALSO CONTAINED IN THE WARRANT.

THEY HAD THE NAME OF PETER ROONEY.

THEY HAD AN ADDRESS IN THEIR RECORDS BECAUSE OF A PREVIOUS ARREST WHICH HAS BEEN MADE AT THE PRECISE LOCATION REQUESTED.

THE APPLICAION TO THE PHONE COMPANY, OF COURSE, DIDN'T EVEN GIVE THE NAME OF PETER ROONEY, IT GAVE A DIFFERENT NAME. [2]

AND THE PEOPLE WOULD URGE THAT THEY HAD ALREADY HAD THAT NAME.

SURVEILLANCE CONNECTED TO KNOWN PEOPLE, PETER ROONEY, APARTMENT 8. THEY SAY IN THE AFFIDAVIT THAT THEY PROCEEDED TO THAT ROOM. THEN OF COURSE THE SUBSIDIARY ISSUE, I SUPPOSE, ABOUT THE SEARCH OF THE COMMON TRASH CAN.

I THINK PERHAPS THE MOST RECENT EXPRESSION IN THAT AREA IS ONE OF MY

CASES. AN AFFIRMATIVE, CERTIFIED PUBLICATION, VERY RARE. I SHOULD REMEMBER THE NAME, IT'S A CATCAPER.

THE CLERK: SADOWSKI.

THE COURT: THAT'S RIGHT. PEOPLE VERSUS SADOWSKI; IT'S CRIM. 43545.

ANYWAY, IT'S OUT.

MR. MILLER: WHAT DOES THAT STATE?

THE COURT: NO EXPECTATION OF PRIVACY, THE TRASH CAN RECEPTABLE IS COMMON TO ALL MEMBERS OF THE APARTMENT BUILDING, TO PARAPHRASE.

ANYWAY, I REGARD THAT AS THE SAME.

MR. MILLER: THE PEOPLE'S POSITION IS AS STATED. THERE IS NOTHING IN THIS WARRANT OR THE AFFIDAVIT

WHICH INDICATES THAT THE PHONE NUMBER WAS UNLISTED.

IT MAY OR MAY NOT HAVE BEEN. I KNOW THAT MR. ROONEY IS READY TO TESTIFY TO THAT. THE AFFIDAVIT IS SIMPLY EVIDENCE, BUT YOU CAN'T PROTECT THE WARRANT ON THE FACE WHEN IT DOESN'T STATE THAT.

BUT THE POSITION IS THAT -- [3]

THE COURT: THAT'S A TECHNICALITY REALLY. YOU WOULDN'T HAVE TO GO TO THE PHONE COMPANY TO FIND OUT WHERE THE SUBSCRIBER WAS OR WHO HE WAS. ALL YOU HAD TO DO WAS PICK IT UP FROM THE TELEPHONE BOOK.

MR. MILLER: IF THEY HAD ONE FOR THAT AREA.

IT PROBABLY WAS UNLISTED, BUT IT'S NOT IN THE WARRANT.

THE COURT: I KNOW THAT.

MR. MILLER: THE MAIN POINT IS THAT THEY HAD THIS INFORMATION FROM OTHER SOURCES.

THE COURT: WHAT'S YOUR RESPONSE TO THAT?

MR. LEWIS: WELL, YOUR HONOR, WHILE THEY HAD THIS NUMBER FROM AN OLD ARREST, THAT WAS A 1978 ARREST. THEY DON'T KNOW THAT THIS --

THE COURT: I DON'T BELIEVE THAT THEY HAD HIS NUMBER FROM THAT ARREST. I'M ASSUMING THAT HE WAS USING ANOTHER NUMBER. THEY HAD THE CURRENT NUMBER BECAUSE THEY GOT THAT FROM THE INFORMANT, RIGHT?

THE AFFIDAVIT DISCLOSES THAT THEY RAN THAT NUMBER THROUGH

DEPARTMENTAL SOURCES, AND YOU KNOW WHAT THAT MEANS.

MR. LEWIS: THAT'S WHAT DIRECTS THEM TO THIS LOCATION.

THE COURT: YES.

THEN IN THE NEXT SENTENCE -- THEY DIDN'T GET THIS DEFENDANT'S NAME, BUT IN THE NEXT SENTENCE THEY SAID THEY ALSO HAD RUN MR. ROONEY'S NAME THROUGH DEPARTMENTAL SOURCES, AND THAT'S ALL RIGHT.

AND THEY FOUND THIS PARTICULAR ADDRESS. [4]

MR. LEWIS: THERE IS NO PROBABLE CAUSE ABSENT THE TRASH CANS -- THE OBSERVATIONS DIDN'T REVEAL ANYTHING; ALL THEY DID WAS SEE HIM GO INTO HIS HOUSE ON A PARTICULAR DAY; THEY ONLY MADE A SURVEILLANCE ON ONE DAY; AND THEY

ONLY SAW HIM GO IN.

THEY MADE A TELEPHONE CALL ON THAT NUMBER AND NOW THAT THEY KNOW HIS NUMBER, GOT HIS LOCATION, THEY HAVE THIS ONE CONVERSATION. SO THAT HAS TO GO OUT TOO.

YOU'RE REALLY LEFT WITH NOTHING MORE THAN GOING TO THE LOCATION AND SEEING --

THE COURT: WELL, NO, JUST A SECOND. THEY HAD THE NUMBER. MAKING A PHONE CALL TO THAT NUMBER DIDN'T REQUIRE KNOWING ANYTHING MORE THAN THE TELEPHONE NUMBER

MR. LEWIS: I THINK WITHOUT KNOWING WHERE THE TELEPHONE GOES, THE INFORMATION FROM THAT REALLY DOESN'T

HELP THEM IN THEIR INVESTIGATION.

THE COURT: YES, BUT IF THEY MAINTAIN THE SURVEILLANCE, THE AFFIDAVIT STATES THEY HAD A BOOKING PHOTO OF MR. ROONEY AND HE WAS APPARENTLY GOING INTO APARTMENT #8.

MR. LEWIS: I THINK IT'S REALLY CLEAR THAT -- YOU KNOW, ABSENT THE CONNECTION WITH THE TELEPHONE NUMBER THAT THEY GOT, THE ADDRESS TO WHICH IT GOES AND THE NAME, THE ONE OBSERVATION AT THAT LOCATION DOESN'T REALLY REFLECT ANY BOOKMAKING ACTIVITY.

THEY SEE MR. ROONEY TO GO INTO THE HOUSE, OR THE APARTMENT. THAT'S ALL THEY REALLY DID, YOUR HONOR, OTHER THAN CHECK THEIR RECORDS. AND MAKE THAT ONE TELEPHONE [5] CALL SOMEWHERE BETWEEN

DECEMBER 30TH AND JANUARY 6TH.

THE COURT: THE TOP OF PAGE A-5, THE FIRST COMPLETE SENTENCE: "AS YOUR AFFIANT AND PARTNER OFFICER LES WYETH, #17223, REACHED THE BOTTOM HALF OF THE TRASH BIN, YOUR AFFIANT LOCATED A BROWN PAPER SHOPPING BAG WITH MAIL ADDRESSED TO PETE ROONEY, 1120 NORTH FLORES, APARTMENT #8, LOS ANGELES."

MR. LEWIS: WE'RE TALKING ABOUT GOING THROUGH THE TRASH. I THINK CLEARLY THAT GOING THROUGH THE TRASH WAS THE VIOLATION OF THE RIGHT OF PRIVACY. THE REASONABLE EXPECTATION OF PRIVACY.

THIS IS WHAT WE ADDRESSED MUCH OF THIS THING TO.

THE COURT: THAT'S WHY I CITED PEOPLE VERSUS SADOWSKI.

MR. LEWIS: AND YOUR HONOR IS INDICATING THAT SADOWSKI STANDS FOR THE PROPOSITION THAT THEY MAY GO THROUGH THE TRASH?

THE COURT: YES, RIGHT, NO EXPECTATION.

MR. LEWIS: IN SPITE OF KRIVDA AND -- I'M NOT FAMILIAR WITH SADOWSKI, YOUR HONOR, BUT I AM WITH EDWARDS AND KRIVDA.

THE COURT: PAGE 13 OF THE -- UNDER ROMAN NUMERAL 111, "THE WARRANT FOR SEARCH OF TRASH BIN WAS PROPER."

MR. LEWIS: IS THAT ON THE GROUND OF NO REASONABLE EXPECTATION OF PRIVACY?

MR. MILLER: COMMMUNAL TRASH BIN. THAT'S THE DIFFERENCE IN

KRIVDA.

THE COURT: WELL, I GUESS THIS IS WHAT I REMEMBER, [6] FOOTNOTE, THEY CONCLUDED THAT THE ISSUE OF THE ISSUE OF THE SEARCH OF THE TRASH BIN WAS NOT BEFORE THEM ON APPEAL. IT HAD BEEN PRESERVED ON THE RECORD BELOW.

BOTTOM OF PAGE 15, HOWEVER, FOOTNOTE 1:

"APPELLANT HAS URGED THAT THE SEARCH OF THE TRASH BIN IN THE CASE AT BAR WAS PROSCRIBED BY PEOPLE V. KRIVDA (1971) 5 CAL. 3D 357. WERE WE TO CONSIDER THIS POINT, WE COULD WITH-OUT DIFFICULTY CONCLUDE THAT TRASH WOULD LOSE

ITS 'IDENTITY" AND THE
DEPOSITOR'S REASONABLE
EXPECTATION OF PRIVACY
UNDER KRIVDA WHEN DEPOSITED
IN A CONTAINER USED BY 72
OTHER APARTMENT DWELLERS
AND TO RANDOM PASSERSBY,
SEE PEOPLE VS. STEWART
34 CAL. APP 3D 695."

MR. MILLER: 34 CAL. APP 3D?

MR. LEWIS: YOUR HONOR, IF I COULD ADDRESS MYSELF TO STEWART.

WE MADE A COMPLETE STUDY AND ANALYSIS OF THE TRASH CAN CASES. AND STEWART IS THE ONLY CASE THAT COMES CLOSE TO JUSTIFYING THE SEARCH OF THE COMMUNAL TRASH BIN.

WE'D HAVE TO CONCEDE THAT EDWARDS AND KRIVDA SAY THAT THERE

IS A REASONABLE EXPECTATION OF PRIVACY IN A HOUSEHOLDER'S TRASH.

EDWARDS WAS ONE WHERE IT WAS ON HIS BACK PORCH AND THE COURT SAID IT ISN'T BECAUSE THEY HAD TO TRESPASS TO DO IT.

KRIVDA CAME ALONG AND SAID, "LOOK, IT ISN'T UNTIL THAT TRASH HAS BEEN REMOVED AND BEEN COMINGLED WITH A LARGE CONGLOMERATION OF TRASH ELSEWHERE AND HAS LOST ITS [7] IDENTITY, SO THAT IT CAN'T BE READ."

IT'S WHEN YOU READ THAT LANGUAGE FROM KRIVDA THAT YOU RECOGNIZE WHAT THEY WERE TALKING ABOUT.

NOW, IN STEWART, YOU HAD A TRASH CAN OR A COMMUNAL TRASH CAN; IT WAS AN APRTMENT [SIC!] BUILDING. AND THE ARGUMENT WAS MADE THAT YOU DONT'T HAVE THE SAME

REASONABLE EXPECTATION OF PRIVACY.

BUT THE COURT IN STEWART WENT ON TO SAY THAT IN THIS CASE THEY HAD BEEN WATCHING STEWART. HE WAS A SUSPECTED OR KNOWN BOOKMAKER. HE HAD GONE TO THIS PLACE DURING BOOKMAKING HOURS, HE WAS LEAVING RIGHT AFTER THE BOOKMAKING HOURS.

ON THIS ONE PARTICULAR DAY HE TOOK HIS TRASH. HE WENT OUT TO THE TRASH, HE LOOKED AROUND AND HE VERY CAREFULLY HID THE TRASH UNDER THE WHATEVER. AND THEY SAID THE TRASH MAN WAS COMING. IT WAS GOING TO BE REMOVED.

THEY FOUND THAT THERE WAS AN EXIGENT CIRCUMSTANCE AND THAT THEY JUSTIFIED THE SEARCH OF THE TRASH UNDER THOSE CIRCUMSTANCES.

AND THEY SPECIFICALLY SAID IN STEWART, "WE ARE NOT PREPARED TO SAY THAT A HOUSEHOLDER IN AN APARTMENT BUILDING WITH A LARGE NUMBER OF PEOPLE, HAS A LESSER EXPECTATION OF PRIVACY."

SO STEWART NEVER REALLY RULED ON THAT, JUDGE.

AND WHAT YOU REALLY HAVE IS, YOU HAVE KRIVDA, WHICH SAYS THAT "UNTIL THE TRASH HAS BEEN REMOVED ELSEWHERE AND BE COMINGLED WITH A LARGE CONGLOMERATION SO THAT IT LOSES ITS IDENTITY TO AVOID BEING READ," THAT'S [8] THE KEY TO THE WHOLE THING; THEY DONT'T WANT THE OFFICERS READING PEOPLE'S TRASH.

WHAT THEY HAD TO DO HERE WAS TO RUMAGE ALL THE WAY THROUGH. IT SAYS "WHEN THEY REACHED THE BOTTOM HALF OF

THE TRASH BIN" -- THAT'S THE TOP OF A-5. IT'S NOT AS THOUGH THEY WALKED BY AND KIND OF SAW IT IN THERE AND MAYBE PUSHED A FEW THINGS AROUND.

SO YOU REALLY GO UP FURTHER IN THIS PARTICULAR CASE.

STEWART DOESN'T HELP THE PEOPLE AT ALL. IT TRULY DOESN'T.

YOUR HONOR'S INDICATED THAT THERE'S A REFERENCE IN YOUR HONOR'S CASE SADOWSKI, TO STEWART. BUT YOU HAVE TO READ STEWART THOROUGHLY AND CAREFULLY AND YOU FIND THAT IT DOESN'T SAY "COMMUNAL."

A LOT OF PEOPLE HAVE THOUGHT THAT COMMUNAL TRASH BINS MAY HAVE A LESSER EXPECTATION OF PRIVACY BECAUSE OF THIS KIND OF CONVERSATION. BUT WHEN YOU READ

IT, IT DOESN'T -- KRIVDA IS STILL THE LAW.

YOU HAVE THE -- YOU KNOW, I DONT'T KNOW WHAT ELSE I COULD SAY TO YOU, OTHER THAN THERE'S BEEN NO CASE THAT HAS DONE AWAY WITH EDWARDS AND KRIVDA. THERE'S BEEN NO CASE THAT HAS SAID A COMMUNAL TRASH CAN OR PEOPLE IN AN APARTMENT BUILDING HAVE A LESSER EXPECTATION OF PRIVACY, YOUR HONOR.

THE COURT: I AGREE WITH YOU THAT THE FOOTNOTE IN SADOWSKI IS DICTUM, BUT THE ISSUE IS NOT BEFORE ME.

MR. LEWIS: WE'VE HAD THESE ISSUES SO MANY TIMES. [9] I'VE HAD THEM AROUND AND I'VE NEVER HAD ONE WITH A CASE OF THIS KIND WHERE THEY'VE HAD TO GO ALL THE WAY DOWN TO THE BOTTOM OF THE TRASH.

IN KRIVDA IT SAYS WHAT IT SAYS AND THE PEOPLE ARE JUST NOT GOING TO BE PERMITTED TO DO IT. IF THEY WANT TO TAKE AN APPEAL...

OTHER THAN THAT, WE'RE LEFT WITH ONE OBSERVATION, ON DECEMBER 16TH THEY SAW HIM DRIVE INTO HIS SUBSTERRANEAN GARAGE AND ON DECEMBER 16TH THERE WERE NUMEROUS FOOTBALL GAMES BEING PLAYED.

THEY OBSERVED IT FOR AN HOUR AND DIDN'T SEE ANYBODY COME IN OR GO OUT.

THAT SHOULD DO IT. SUBMITTED.

THE COURT: EXTREMELY CLOSE ISSUE OF LAW.

I'M GOING TO GRANT THE MOTION AND LET THE PEOPLE TAKE IT UP.

MR. LEWIS: THANK YOU, YOUR HONOR.

I PRESUME WITH THIS RULING, THE PEOPLE WOULD BE UNABLE TO PROCEED.

MOTION TO DISMISS, YOUR HONOR.

MR. MILLER: TRUE.

WHAT'S THE BASIS OF THE COURT'S RULING, THE STEWART CASE, THE SEARCH OF THE TRASH CAN?

THE COURT: YES. I THINK THEY OUGHT TO GET A HOLDING ON THIS, DON'T YOU?

MR. MILLER: I WOULD THINK THAT STEWART WOULD BE THE CASE THAT WOULD CONTROL ON THIS. I DON'T BELIEVE THAT IT STANDS FOR WHAT MR. LEWIS STATES IT STANDS FOR. [10]

MR. LEWIS: HAVE YOU READ STEWART, COUNSEL? I'M NOT MISQUOTING, I HAVE QUOTES FROM STEWART RIGHT IN THE

BRIEFS, TAKEN RIGHT OUT OF THERE; IT'S NOT JUST ORAL ARGUMENT MADE JUST NOW.

THE COURT: OKAY, THAT'S IT.

(PROCEEDINGS CONCLUDED.)

* * * [11]

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE, Plaintiff and Appellant, v. PETER ROONEY, Defendant and Respondent.	No. B006936 (Super.Ct. No. A 088619)

APPEAL from a judgment of the Superior Court of Los Angeles County. D. Fitts, Judge. Reversed.

Ira Reiner, District Attorney of Los Angeles County, Donald J. Kaplan and Arnold T. Guminski, Deputy District Attorneys, for Plaintiff and Appellant.

(Court of Appeal, Second Dist., Filed December 1985, Clay Robbins, Jr., Clerk.)

Arthur Lewis, for Defendant and Respondent.

The People bring this appeal (Penal Code, § 1238, subd. (a)(7)[1] from the order dismissing the case against defendant who was charged with bookmaking (§ 337a). The dismissal was entered after the prosecution represented that it could not proceed due to the granting of defendant's motion to quash a search warrant and suppress evidence (§ 1538.5). The first issue before us is whether the warrantless search of the defendant's apartment building's trash bin constituted an unreasonable search and seizure. We conclude that it did for lack of probable cause. The second issue is

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1. Hereafter, all section references are to the Penal Code.

whether a police officer's affidavit provided probable cause for the issuance of the search warrant authorizing the search of defendant's apartment. We conclude that even excluding the items seized from the trash bin, the tip from the informant coupled with other corroborating evidence were sufficient to support the warrant. We therefore reverse and remand.

I

FACTUAL AND PROCEDURE BACKGROUND

The following evidence was before the magistrate. On December 3, 1983, an informant told the affiant, Officer Shorb, that defendant, Peter Rooney, was accepting wagers on professional football games over the telephone and with an answering machine at (213) 656-8430. Although the informant told Shorb that defendant was "in the loca-

tion between 1600 hours and 1800 hours," the informant did not tell Shorb the address of "the location."

On December 7, 1983, Shorb ascertained through the telephone company that the number given to him by the informant was registered to a Peter Ryan at 1120 North Flores Street, Apartment #8, West Hollywood. Shorb also determined that the utilities at that address were registered in the name of Peter Ryan.

On December 13, 1983, Shorb learned from defendant's arrest record that defendant had been arrested three years earlier for bookmaking activities at 1120 North Flores Street, Apartment #8, West Hollywood. Shorb obtained a booking photo of defendant from the prior arrest.

On December 15, 1983, Officers Shorb and Wyeth went to 1120 North Flores Street, West Hollywood, a 28-unit apartment building with a subterranean garage. The officers entered the garage and conducted a search of the communal trash bin, which measured approximately 8'x4'x5', and was filled to capacity. Upon reaching the bottom half of the bin, Shorb discovered a brown paper shopping bag with mail addressed to defendant, but not to Peter Ryan, at 1120 North Flores Street, Apartment #8, West Hollywood, the address obtained from the telephone company and defendant's arrest record. The bag also contained pieces of paper with "sports wagers, pays and owes, and a tally sheet of wagers on professional football teams. . . ."

While conducting a surveillance of the apartment building on December 26,

1983, Shorb saw a male caucasian, whom he recognized from the booking photograph to be defendant, drive into the subterranean garage and enter apartment #8. Shorb observed apartment #8 for approximately one hour, during which time no one entered or left. This occurred on the Friday afternoon before a weekend when numerous professional football games were to be played.

Subsequently, Shorb dialed the telephone number that was given to him by the informant and which the telephone company told him was listed to apartment #8, and overheard a telephone conversation between the informant and an unknown male. The informant asked, "'What's the latest line?,'" to which the unknown male responded with the latest point spreads on professional football games.

Both Officers Shorb and Wyeth had prior experience in bookmaking investigations and arrests, from which they formed the opinion that defendant was operating a bookmaking office at the apartment. Based on Shorb's supporting affidavit which detailed the above information, a search warrant issued authorizing a search of defendant's apartment. The record on appeal contains no details of the search, the items seized, or defendant's arrest.

Defendant moved to quash the search warrant and to exclude evidence (§ 1538.5). In granting his motion, the magistrate stated that the betting markers and paraphernalia found in the warrantless search of the trash bin were the fruits of an invalid search. The magistrate concluded that the other evidence corroborating the informant's

tip -- the telephone conversation concerning the latest line and defendant's prior arrest for bookmaking at the same address that was matched to the telephone number provided by the informant -- failed to provide probable cause to support the issuance of the search warrant.

After the superior court granted the prosecution's section 871.5 motion, defendant again moved to quash the search warrant and to suppress evidence (§ 1538.5). At the hearing on defendant's motion, the trial court ordered the search warrant quashed and the evidence suppressed on the ground that the warrantless search of the trash bin constituted an unreasonable search and seizure.

Following the prosecutor's representation that the People would not be able to proceed, the case was dismissed. The prosecution appeals from the order of dismissal.

II

DISCUSSION

The prosecution contends that the warrantless search of the trash can was a valid search under both the federal and state Constitutions, and that the search warrant was properly supported by the existence of probable cause.

A. The Warrantless Search of the Trash Bin

The issue before us is the reasonableness of defendant's expectation of privacy in a bag of trash placed in a communal trash bin located in the apartment's garage, an area accessible to the public. First, we note that the mere

fact that the trash bin was located in an area accessible to the public is not dispositive of the issue. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. [Citations.] But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." (Katz v. United States (1967) 389 U.S. 347, 351-352.)

With respect to the validity of trash can searches, our Supreme Court has stated that the "secondary degree of protection [that] applies to automobiles . . . also appears to apply to a trash can placed by the curb for the disposal of its contents . . . ." (People v. Dumas (1973) 9 Cal.3d 871, 882, fn. 9.) An automobile

"may be searched upon probable cause and upon a showing that 'delay would enhance the possibility the articles would be destroyed or placed beyond the reach of the officers. [Fn. omitted.]'" (People v. Parker (1974) 44 Cal.App.3d 222, 229.) In Dumas, the court noted that it would be anomalous to hold that a trash can next to a house may not be searched "but that an automobile parked immediately adjacent to it is subject to such a search, inasmuch as an automobile undeniably evokes at least as great an an expectation of owner privacy as a trash can." (People v. Dumas, supra, 9 Cal.3d at p. 884.)

Under California law, trash placed in a trash can in one's back yard or in front of one's house where it can be collected is not abandoned property outside the scope of protection of the

state Constitution. In People v. Edwards (1969) 71 Cal.2d 1096, our Supreme Court held that trash placed in a trash can located in the defendant's back yard was not abandoned, and thus not placed beyond the protection of the Fourth Amendment and article I, section 19, of the California Constitution. (Id., at pp. 1104-1105.) As stated in Edwards: "The marijuana itself was not visible without 'rummaging' in the receptacle. So far as appears defendants alone resided at the house. In the light of the combined facts and circumstances it appears that defendants exhibited an expectation of privacy, and we believe that expectation was reasonable under the circumstances of the case. We can readily ascribe many reasons why residents would not want their castaway clothing, letters, medicine bottles or other telltale refuse

and trash to be examined by neighbors or others, at least not until the trash had lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere." (Id., at p. 1104.)

And in People v. Krivda (1971) 5 Cal.3d 357, our Supreme Court held that a trash can placed in front of the defendant's house for collection of its contents was not abandoned property placed beyond the protection of the Fourth Amendment and the state Constitution.[2/] While it may be reasonable to anticipate that nonpolice third persons may rummage through and scavenge from one's trash barrels despite local ordinances prohibiting such behavior, the probability

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2. The United States Supreme Court vacated and remanded Krivda, to inquire as to whether the decision was based on federal or state constitutional grounds. (California v. Krivda (1972) 409 U.S. 33.) The court's opinion on remand (People v. Krivda (1973) 8 Cal.3d 623) adopted both federal and state constitutional grounds.

of that occurrence does not not necessarily create the same expectation that police would rummage through and retrieve evidence from one's trash barrels without a search warrant. (People v. Krivda, supra, 5 Cal. 3d at pp. 366-367.) The court expressed a concern against "encourag[ing] a practice whereby our citizens' trash can could be made the subject of police inspection without the protection of applying for and securing a search warrant." (People v. Krivda, supra, 5 Cal.3d at p. 367.)

While it appears logical to conclude that a tenant who places trash in a communal trash bin possesses less of a privacy expectation than one who places trash in a privately owned trash can such as in Edwards and Krivda, we are not prepared to adopt an "open fields" rule for communal trash bins, thereby eliminating the need for any particular showing of cause. (See Hester v. United States (1924) 265 U.S. 57, 58-59; People

v. Dumas, supra, 9 Cal.3d at p. 882.) Our position is supported by other appellate decisions concerning communal trash bin searches that have not distinguished Krivda solely on the difference between privately owned trash cans and communal trash bins. (People v. Parker, supra, 44 Cal.App.3d 222; People v. Stewart (1973) 34 Cal.App.3d 695.)

The court in Stewart recognized the logic of concluding that an apartment house tenant who uses communal trash bins has less reason to believe what he deposits will remain

private than does a resident of a single family dwelling using a privately owned trash can. (Id., at p. 700.)[3/] But Stewart recognized that "what further distinguishes [Stewart] from Krivda, however, is the fact that police here had probable cause to believe the trash cans contained evidence of a crime." (Ibid.) Krivda "did not preclude the possibility that a warrantless search of the trash can would have been valid had probable cause existed to support it." (People v. Dumas, supra, 9 Cal.3d at p. 884.)

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3. We note, however, that the California Supreme Court depublished People v. Smith (1975) 52 Cal.App.3d 514, which stated that "[u]sers of the communal receptacle . . . . have no more reason than the householder [in a single family dwelling] to expect their trash to be examined by police officers." (Id., at p. 522.)

Similarly, the court in Parker upheld the warrantless search of a communal trash bin due to the existence of probable cause. (People v. Parker, supra, 44 Cal.App.3d at p. 229.) The court stated: "We do not believe, however, that [Krivda] thereby intended to draw any hard and fast distinction between trash which is at curbside and that which is still on the exterior premises of an apartment house. Rather, the distinction which the court drew was between 'fishing expeditions' where the officer lacked probable cause to believe the trash can contained contraband and those situations where such probable cause existed, as was the case herein. Again, analogy with the automobile cases is helpful. Searches of vehicles have been upheld not only where the vehicle was in transit on the highway, but where it was parked at a curb, adjacent to or far from the defendant's home, and even when it was parked in a common garage

area of the defendant's apartment. [Citation.] Parallel reasoning requires a similar result to apply to trash in a common receptacle adjacent to a large apartment." (People v. Parker, supra, 44 Cal.App.3d at p. 231.)

We agree with Stewart and Parker that the rationale cited for relaxing the warrant requirement for automobile searches applies to communal trash bin searches. As stated by the court in Parker: "Materials placed in trash cans, being placed there for removal and disposal, are highly portable. While trash is typically removed on a specific ascertainable day and within certain circumscribed hours, it is just as typically not subject to the security precautions people normally take with respect to property they intend to keep. Trash placed in a common receptacle used by multiple apartment dwellers is

especially likely to be tampered with. Trespassory incursions into exterior trash receptacles by human and animal foragers, although unwelcome are not totally unexpected. People normally do not take particular pains to assure that the contents of their trash bins will not be damaged by the weather and the likelihood of weather damage is increased when many people regularly use the receptacle." (People v. Parker, supra, 44 Cal.App.3d at p. 230.) Because the characteristics of trash receptacles are those "which diminish the reasonable expectation of privacy as to their contents and make it impractical to obtain a warrant, minimal additional circumstances need be shown by

the People in any particular case to justify their dispensing with a warrant." (Ibid.)

We now consider the validity of these decisions in light of the California Supreme Court's conclusion that article I, section 28, subdivision (d), of the state Constitution, the "Truth in Evidence" provision of the Victim's Bill of Rights (Proposition 8), abrogates "a defendant's right to object to and suppress evidence seized in violation of the California but not the federal, Constitution." (In re Lance W. (1985) 37 Cal.3d 873, 879.) While various federal courts have held that trash placed in an area where it can be collected is abandoned property that it not protected by the Fourth Amendment, those decisions are not binding on this

court since the United States Supreme Court has never squarely ruled on the issue. (See United States v. Sumpter (8th Cir. 1982) 669 F.2d 1215, 1221; United States v. Vahalik (5th Cir. 1979) 606 F.2d 99, 100-101; United States v. Shelby (7th Cir. 1978) 573 F.2d 971, 973-974; United States v. Crowell (4th Cir. 1978) 586 F.2d 1020, 1024-1025; Magda v. Benson (6th Cir. 1976) 536 F. 2d 111, 112-113; United States v. Mustone (1st Cir. 1972) 469 F.2d 970, 972; United States v. Dzialak (2d Cir. 1971) 441 F.2d 212, 215; United States v. Minker (3d Cir. 1962) 312 F.2d 632, 634-635.)

Because Edwards and Krivda are based on both federal and state constitutional provisions, we find them to be valid and binding authority that

this court must follow until either the California or United States Supreme Court rules on the issue. Since the search of the trash bin was without a warrant, the burden was on the prosecution to show proper justification. (People v. Edwards, supra, 71 Cal.2d at p. 1099.)

The prosecution contends that the trash was abandoned and hence fell outside the protection of the Fourth Amendment when it was placed in the communal trash bin. (Abel v. United States (1960) 362 U.S. 217.) In Abel, officers arrested defendant in his hotel room and waited while defendant packed his bags and checked out of the hotel. Defendant left behind certain items in the waste basket in the hotel room. Abel held that it was not "unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with

crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were bona vacantia. There can be nothing unlawful in the Government's appropriation of such abandoned property." (Id., at p. 241.)

We distinguish Abel on its facts. Abel simply held that a defendant, after checking out of a hotel, retained no privacy expectation in the trash he left behind in the hotel room trash can. In the case at bench, the items were not left behind in a vacated hotel room as in Abel, but were placed in a trash bin in the garage of an apartment building. Under the line of California cases which classsifies trash cans under the secondary level of protection applicable to automobiles in determining Fourth Amendment search

and seizure issues (see People v. Dumas, supra, 9 Cal.3d at p. 882, fn. 9), the burden rested on the prosecution to show that the trash had been abandoned under the facts of the case, or to show that the officers had probable cause to believe that the trash bin contained contraband. (See People v. Superior Court (1972) 23 Cal.App.3d 1004, which held the defendant had abandoned her trash bag by placing it in her neighbor's garbage can, thereby forsaking any reasonable expectation of privacy as to its contents.)

Here, the prosecution made no factual showing that the trash in the bin hand been abandoned. The placement of one's trash in a communal bin in the subterranean garage of one's apartment building is not necessarily an abandonment of one's trash to the police or general

public. As our Supreme Court stated in Krivda: "[H]ad defendants simply cast their trash onto the sidewalk for anyone to pick over and cart away, we would have no difficulty finding that defendants had thereby forsaken any reasonable expectation of privacy with respect thereto. (Fn. omitted.]" (5 Cal.3d at pp. 365-366.) But the existence of many municipal "ordinances which restrict the right to collect and haul away trash to licensed collectors, whose activities are carefully regulated" (ibid.), would appear to refute the view that the contents of one's trash bags in the trash bins become public property when placed in the bin for collection.

However, we disagree with defendant's argument that he had a heightened expectation of privacy in the trash bin because it was located within the "curtilage" of his apartment. People v. Terry

(1964) 61 Cal.2d 137, 152-153, provides contrary authority. In Terry, police officers observed what appeared to be a marijuana cigarette on the dashboard of the defendant's car. Like the trash bin herein, the automobile in Terry was located in the subterranean garage of the defendant's apartment building. In upholding the warrantless search of the car due to the existence of probable cause, Terry stated, "Apparently the apartment garage was a common area; the officers did not commit a trespass by entering it." (Id., at p. 152.) In People v. Dumas, supra, 9 Cal.3d 871, our Supreme Court noted that the police in Krivda, unlike in Terry, lacked probable cause to justify the warrantless search. "Krivda . . . did not preclude the possibility that a warrantless search of the trash can would have been valid had

probable cause existed to support it. In this light, no conflict with Terry appears, and it is clear that an automobile does not become immune from the Carrol [v. United States (1925) 267 U.S. 132] rule permitting warrantless search simply because it is parked on or near a defendant's premises. [Citation.]" (Id., at p. 884.)

In the instant case, the trash at issue was not in plain view, but was located halfway down in the trash bin, in a paper bag. The contents of the bag were not visible without emptying or searching through the bin and the bag. The fact that the bag was "commingled" with a quantity of trash belonging to others, does not distinguish Edwards, because the bag's contents "had [not] lost its identity and meaning by becoming part of a large conglomeration of trash

elsewhere." (People v. Edwards, supra, 71 Cal.2d at p. 1104.)

At the time of their search of the trash bin, the officers had only the hearsay information provided by the informant coupled with the knowledge that the telephone number was registered to a Peter Ryan at the same address where defendant had been arrested for bookmaking three years before. Because there is nothing in the record to show that the informant was a citizen informant who was either a victim or a witness of a crime, other than the officer's conclusory use of the term "citizen informant," there must have been some corroboration of the informant's tip in order for there to have been probable cause. (See People v. Smith (1976) 17 Cal.3d 845, 852.) We find that the record is insufficient to establish the probability that evidence

of bookmaking would be found in the trash bin. Had the police waited to search the trash bin until after they observed the defendant entering the apartment and after they overheard the telephone conversation concerning the point spreads, we would reach a different result.

B. The Search Warrant is Supported by Probable Cause, Even Excluding the Items Seized from the Trash Bin

The standard by which a magistrate must determine the existence of probable cause for the issuance of a search warrant was explained in Illinois v. Gates (1983) 462 U.S. 213, 235, as follows: "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's

decision. While an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful, it is clear that 'only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause.' [Citations.]"

With respect to the test for determining the credibility of anonymous informants and the accuracy of their information, Gates abandoned the two-pronged test established by Aguilar v. Texas (1964) 378 U.S. 108, and Spinelli v. United States (1969) 393 U.S. 410, and adopted a test based on the totality of the circumstances. Gates provides: "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . .

including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed. [Citation.]" (Illinois v. Gates, supra, 462 U.S. at pp. 238-239.) The court repeated its often quoted statement: "A magistrate's 'determination or probable cause should be paid great deference by reviewing courts.' [Citation.]" (Id., at p. 236.)

We find that the search warrant authorizing the search of defendant's apartment was properly supported by probable cause. Viewing the evidence as a whole, we conclude that sufficient

evidence existed to determine a significant probability that evidence of bookmaking would be found in the apartment, even excluding the items seized from the trash bin.

A review of the facts in Gates is helpful to our determination that probable cause existed herein. In Gates, the police received an anonymous letter detailing the manner in which defendants moved drugs between Florida and Illinois, and predicted a trip on May 3. Police surveillance confirmed such a trip. The court upheld the search warrant, stressing the value of the corroboration of the details of the informant's tip: "The corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he

would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true. '[B]ecause an informant is right about some things, he is more probably right about other facts' [citation] -- including the claim regarding the Gateses' illegal activity. This may well not be the type of 'reliability' or 'veracity' necessary to satisfy some views of the 'varacity prong' of Spinelli [v. United States, supra, 393 U.S. 410], but we think it suffices for the practical, common-sense judgment called for in making a probable-cause determination. It is enough, for purposes of assessing probable cause, that '[c]orroboration through other sources of information reduced the chances of a reckless of prevaricating tale,' thus providing 'a substantial basis for crediting

the hearsay.' [Citation.]" (Illinois v. Gates, supra, 462 U.S. at pp. 244-245.)

In the case at bench, the informant's tip was corroborated in significant part through independent police investigation. First, defendant's police record showed that he had previously been arrested for bookmaking activities at apartment #8, the same apartment that was registered with the telephone company for the number provided by the informant. While defendant contends that People v. Chapman (1984) 36 Cal.3d 98, prohibits the police from using telephone company records to obtain the names and addresses of customers with unlisted telephone numbers, we find that there was a Fourth Amendment violation here. As a consequence of Lance W., the police did not need a warrant to obtain the address from the

telephone company. Chapman explicitly recognized that such a requirement does not exist under federal law, citing Smith v. Maryland (1979) 442 U.S. 735. (People v. Chapman, supra, 36 Cal.3d at 107, fn. 6; see People v. Lissauer (1985) 169 Cal.App.3d 413.) In addition, defendant cannot complain of the inevitable discovery of the address through his arrest record.

Second, the informant's tip that defendant was in "the location" where the telephone was located between certain hours was further corroborated when defendant was seen parking his car in the apartment building and entering apartment #8. Although the telephone and utilities for that apartment were listed in the name of Peter Ryan rather than in defendant's name, Shorb's affidavit states that this is consistent

with the conducting of bookmaking activities at that location.

Moreover, the informant's tip that defendant was taking bets over the telephone for professional football games was partially corroborated when Shorb, who dialed the number provided by the informant and registered to the apartment entered by defendant, overheard a conversation between the informant and an unknown male concerning the point spreads for professional football games.

We are not persuaded by defendant's argument that the fact he was seen entering the apartment during the predicted hours and that the officer overheard a the telephone conversation concerning point spreads do not constitute corroboration because there was nothing criminal about either event. However, the corroboration of an

anonymous informant's tip does not require a showing of criminal activity: "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." (Illinois v. Gates, supra, 462 U.S. at pp. 243-244, fn. 13.) We note that here, as in Gates, the corroborating evidence of "'seemingly innocent activity became suspicious in light of the initial tip.'" (Ibid.)

Our determination of the existence of probable cause for the issuance of the search warrant is not altered even if the incriminating items found in the trash bin are excluded. The other evidence presented by the prosecution are both substantial and independent

evidence that cannot be deemed tainted by any alleged illegality connected with the search of the trash bin.

Accordingly, we reverse the order of dismissal and remand for further proceedings consistent with the views expressed herein.

CERTIFIED FOR PUBLICATION

THOMPSON, J.

We concur:

LILLIE, P. J.

JOHNSON, J.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. PETER ROONEY, Defendant and Appellant.	No. B006936 (Super.Ct. No. A088619) ORDER MODIFYING OPINION

THE COURT:

It is ordered that the opinion in the above entitled matter filed December 13, 1985, be modified in the following respects:

Delete from page 23, lines 13, 14 and 15 the following:

(Court of Appeal, Second Dist., Filed December 19, 1985, Clay Robbins, Jr., Clerk.)

"We concur:

LILLIE, P. J.

JOHNSON, J."

and substitute therefore the following:

I concur:

JOHNSON, J.

I concur in the judgment only.

LILLIE, P. J.

CERTIFIED FOR PUBLICATION

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CLAY ROBBINS, JR., CLERK

DIVISION: 7 B006936

Office of the District Attorney
Richard W. Gerry
849 South Broadway
11th Floor
Los Angeles, CA 90014

JAN 7 - 1986

RE: People of the State of Calif.
vs.
Rooney, Peter
2 Criminal B006936
Los Angeles No. A088619

THE COURT:

Petitions for rehearing denied.

I would grant; Lillie, PJ.

O R D E R D E N Y I N G R E V I E W

AFTER JUDGMENT BY THE

COURT OF APPEAL

2nd District, Division 7, No. B006936

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

I N B A N K

==========

PEOPLE

v.

PETER ROONEY

==========

Petitions for review DENIED.

Lucas, J. and Panelli, J., are of the opinion the petition should be granted.

BIRD

Chief Justice

(Supreme Court, Filed March 13, 1986, Laurence P. Gill, Clerk.)

OFFICE OF THE CLERK

COURT OF APPEAL

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

CLAY ROBBINS, JR., CLERK

DIVISION: 7 B00693

Office of the District Attorney
Richard W. Gerry
849 South Broadway
11th Floor
Los Angeles, CA 90014

RE: People of the State of Calif.
vs.
Rooney, Peter MAR 20 1986
2 Criminal B006936
Los Angeles No. A088619

THE COURT: Application for stay of issuance of remittitur is granted.

Supreme Court, U.S.
FILED
NOV 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1835

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

On Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division Seven

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether there can be reasonable expectation of privacy, for the purposes of the Fourth and Fourteenth Amendments, with respect to garbage placed in a communal trash bin of a multi-unit apartment building.

2. Whether there is an abandonment of property, for purposes of the Fourth and Fourteenth Amendments, when garbage is placed in a communal trash bin of a multi-unit apartment building.

3. Whether the Fourth and Fourteenth Amendments are violated when a police officer searches a communal trash bin of a multi-unit apartment building without a search warrant, probable cause, or consent.

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OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Seven is reported (as modified) as People v. Rooney, 175 Cal.App.3d 634, 221 Cal.Rptr. 49(1985). A copy of this opinion is set forth at pages 72-111 of the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven was filed on December 13, 1985, and the opinion was modified on December 19, 1985. (JA 72,110.) Timely petitions for rehearing were denied by the Court of Appeal on January 7, 1986. (JA 112.) Timely petitions for review were denied by the California Supreme Court on March 13, 1986. (JA 113.) Where the highest state court has jurisdiction to review a decision of a lower state court but refuses

to do so, the time for petitioning for a writ of certiorari runs from the date of the refusal to review. (American Railway Express Co. v. Levee 263 U.S. 19, 20-21 (1923). Our petition was filed on May 6, 1986, and was therefore timely. (Sup.Ct. Rule 20.1.) The petition was granted on October 14, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and

the persons or things to be seized." U.S. CONST. amend. IV.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

The pertinent California constitutional provisions include:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." CAL. CONST. art I, § 13.

"Right to Truth-in Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be

excluded in any criminal proceedings, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

CAL. CONST. art 28, subdivision (d).

Pertinent California statutory provisions include:

Penal Code Section 337a;

Penal Code Section 871.5;

Penal Code Section 1238;

Penal Code Section 1385;

Penal Code Section 1538.5.

STATEMENT OF THE CASE[1/]

I. History Of The Case

The instant case pertains to the legal sufficiency on its face of the affidavit in support of a search warrant and to the admissibility of evidence seized prior to the issuance of that warrant. The warrant (JA 7-12) authorized the search and seizure of evidence pertaining to bookmaking at apartment #8, 1120 North Flores Street, West Hollywood. The supporting affidavit (JA 13-28) contained an opinion of the affiant and his partner officer that a straight-in-back office bookmaking operation was conducted at the premises in question. (JA 26-27.)

We summarize the affidavit, in its salient aspects, as follows: A confidential informant informed Officer Ray E. Shorb, a police officer of the City of Los Angeles, the affiant, on December 3, 1983, "that Pete Rooney at telephone

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1. The Joint Appendix, the Clerk's Transcript, and the Reporter's Transcript on Appeal will be hereinafter respectively cited as "JA", "CT", and "RT".

number 213-656-8430 was accepting wagers on professional football events." The affiant confirmed "through Departmental sources" that the telephone number was listed to 1120 North Flores Street, apartment #8, West Hollywood, with Peter Ryan as subscriber. A record check disclosed that Peter Rooney had one prior bookmaking arrest, on September 11, 1978, at the same address. Officer Shorb obtained a bookmaking photograph of Peter Rooney. (JA 19-21.)

On December 15, 1983, Shorb and Les Wyeth, his partner officer, went to 1120 North Flores Street. They walked down the driveway to the apartment trash bin, approximately 8 feet long by 4 feet wide by 5 feet high, located in the subterranean garage of the apartment building.[2/]

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2. The Court of Appeal's opinion refers to the apartment building as having twenty-eight units. (JA 77.) However, neither the warrant nor affidavit specified the number of apartments in the building. It is described as simply being a "two story multi-unit building." (JA 9, 15.) The origin of the Court of Appeal's statement appears to have been a representation made by a deputy district attorney

There was trash spilling out of the bin onto the ground. The officers searched the bin and noticed that trash from numerous different apartments was co-mingled inside it. When they reached the bottom half of the bin, Shorb noticed a paper shopping bag with mail addressed to Pete Rooney, 1120 North Flores, #8, Los Angeles. Within this bag of trash, the officer discovered, inter alia, pieces of paper with sports wagers, pays and owes, and a tally sheet of wagers on different professional football teams. There was mail addressed to Pete Rooney but not to Peter Ryan in this bag. (JA 21-22.)

On December 16, 1983, Shorb observed a male caucasian, whom he recognized from the

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to the magistrate, which was not challenged by defense counsel. (CT 7.)

Although the affidavit does not expressly disclose whether the subterranean garage was open or not, "tested and interpreted in a commonsense and realistic fashion (United States v. Ventresca, 380 U.S. 102, 108(1965), the affidavit must be understood as indicating that the entry by the officers was into an open garage. Nowhere has respondent contended to the contrary. Indeed the Court of Appeal characterized the garage as "an area acessible to the public." (JA 80, 81.)

booking photograph to be Peter Rooney, drive into the subterranean garage at the apartment building in question and then enter apartment #8. (JA 22-23.)

Between December 30, 1983 and January 6, 1984, the officer dialed telephone number 213-656-8430 and overheard a telephone conversation between "a citizen informant and an unknown male." The informant asked the unknown male, "What's the latest line?"[3/] The unknown male returned with the latest line on the professional football games to be played. (JA 23-25.) Both Shorb and Wyeth had bookmaking expertise. (JA 23, 25-26.)

Having concluded that a bookmaking operation was being conducted at the premises in question, Officer Shorb obtained a search warrant on July 17, 1984 from Judge Nancy Brown, Municipal Court of Los Angeles Judicial District, authorizing search of Rooney's apartment.

---

3. The term "latest line" means the point spread.

After the execution of the warrant, Rooney was charged in a felony complaint with having committed, on or about January 22, 1984: bookmaking (California Penal Code Section 337a,[4/] Subdivision 1) in count I; keeping a place with paraphernalia (id., Subdivision 2) in count II; recording wagers (id., Subdivision 4), in count III; permitting a place to be used for bookmaking purposes (id., Subdivision 5) in count IV; and accepting wagers (id., Subdivision 6) in count V. (JA 24-36.) Rooney moved that the magistrate quash the search warrant pursuant to Penal Code Section 1538.5.[5/] A hearing was held on said motion to quash and the magistrate dismissed the felony complaint on April 12, 1984, after the magistrate granted the motion to quash and the People represented that they would be unable to proceed. (CT 21.)

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4. For the pertinent portion of Section 337a, see APP-1.

5. For the pertinent portion of Section 1538.5, see APP-7.

The prosecution moved in the Superior Court that the felony complaint be reinstated pursuant to Penal Code Section 871.5.[6/] (CT 38-41.) On May 16, 1984, the Superior Court granted the People's motion to reinstate the felony complaint. Respondent then waived his right to a preliminary hearing. The parties stipulated that respondent be bound over to the Superior Court and that the information be deemed filed on that date with the same charges as in the felony complaint. Rooney was then arraigned and pleaded not guilty, and the cause was continued. (JA 37-39.)

On May 24, 1984, Rooney moved to suppress evidence pursuant to Penal Code Section 1538.5. (JA 40-45.) On June 6, 1984, a hearing was held in the Superior Court of Los Angeles County on said motion. After argument, that court granted the motion to suppress the evidence

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6. For the pertinent portion of the text of Section 871.5, see APP-4. Section 871.5 authorizes the Superior Court to review the dismissal of a felony complaint, or a portion thereof, by the magistrate.

recovered from the trash bin and that evidence seized pursuant to the warrant. After a representation that the People would be unable to proceed, the Superior Court dismissed the criminal action pursuant to Penal Code Section 1385.[7] (JA 46-48, 69-70.) The People appealed from that order as authorized by Penal Code Section 1238.[8]

The Court of Appeal of the State of California, Second Appellate District, Division Seven, reversed the order dismissing the criminal action against respondent in an opinion issued on December 13, 1985. (JA 72-112.) It ruled that the search warrant used to obtain evidence was supported by probable cause, but held that the incriminating items found in the trash bin belonging to the multi-unit apartment building in which respondent lived to have been seized in violation of the Fourth Amendment, prior to the issuance of the search warrant.

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7. For the text of Section 1385, see APP-6.

8. For the pertinent portion of the text fo Section 1238, see APP-6.

By virtue of the Court of Appeal's ruling, unless reversed by this Court, these incriminating items will therefore be inadmissible at the forthcoming trial of respondent.[9/]

II. Legal Background

In People v. Krivda, 5 Cal.3d 357, 95 Cal.Rptr. 62, 468 P.2d 689(1971), police officers observed the refuse collectors approaching defendants' premises (a single family dwelling), stopped the collectors about a half a block from the dwelling, identified themselves, requested them to empty the well of their trash truck, and to pick up the trash cans in front of defendants' premises on the parkway adjacent to the sidewalk. The California Supreme Court held that defendants had a reasonable expectation of privacy with respect to their trash contained in paper sacks located within the well of the refuse collectors' truck. That court

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9. See Penal Code Section 1538.5, division (c), reprinted at APP-7. Our argument that the suppression of the items found in the trash bin constitutes a final judgment, within the meaning of 28 U.S.C. § 1257, is set forth in pages 13-16 of our petition for writ of certiorari.

held that the warrantless search of the trash was unlawful because, although the trash was in the well of the truck, at no time did it lose its identity by being mixed and combined with the conglomeration of trash previously placed in the truck.

This Court granted certiorari with respect to Krivda in 1972 (405 U.S. 1039). Subsequently, however, the judgment of the California Supreme Court was vacated and that cause remanded to that court for appropriate clarification as this Court was unable to determine whether the California court had based its holding upon the Fourth and Fourteenth Amendments to the United States Constitution, or upon the equivalent California constitutional provision, or both. (California v. Krivda, 409 U.S. 33(1972). Thereafter, the California Supreme Court reissued its initial opinion pursuant to this Court' mandate for further proceedings (Krivda, 409 U.S. 33), and certified that it relied upon both the Fourth Amendment and the State Constitution. Accordingly, the latter's search-seizure

provision furnished an independent ground to support its holding. (People v. Krivda, 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457(1973).)

In the instant case, the Court of Appeal held that the search of the communal trash bin violated the search-seizure provisions of both the Federal and California Constitutions. However the prosecution in the instant case began after June 9, 1982. Article I, Section 28, Subdivision (d) of the State Constitution[10/] abrogates a defendant's right to object to and suppress evidence seized in violation of the California, but not the federal Constitution (In re Lance W., 37 Cal3d 873, 210 Cal.Rptr. 631, 694 P.2d 744(1985)) with respect to prosecutions committed after June 9, 1982, the effective date of the adoption of Proposition 8. (People v. Smith, 34 Cal.3d 251, 193 Cal.Rptr. 692, 667 P.2d 149(1983).

The Court of Appeal noticed the applicability of the aborgation of the exclusionary

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10. The pertinent portion of Article I, Section 28 of the California Constitution is set forth supra, at 3.

rule based solely upon State constitutional grounds with respect to Rooney. (JA 91.) Hence the validity of the trash-bin search under the Federal Constitution is squarely before this

The Court of Appeal in the instant case upheld the validity of the warrant notwithstanding its conclusion that the trash bin search was invalid. However, the search warrant was issued in part because of the magistrate's reliance on the affiant's recitation of the facts pertaining to the trash bin search. No evidence was taken at the suppression hearing in the trial court. Thus, the Court of Appeal made its determination

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11. The Fourth Amendment is applicable to the States by virtue of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643(1961); Ker v. California, 374 U.S. 23(1963). Since the filing of our petition, the Court of Appeal of the State of California, Fourth District, Division Three, has also held that the Fourth Amendment prohibits the warrantless search of the contents of trash barrells set out for routine collection where, pursuant to the officer's request, the trash collector had cleaned his truck bin of other refuse, collected defendant's trash, and then gave it to the officer for searching. People v. Greenwood, 182 Cal.App.3d 729, 227 Cal.Rptr. 539(1986). The California Supreme Court denied the People's petition for review on August 28, 1986.

that the trash bin search was invalid based upon its reading of the affidavit in support of the warrant. Hence in evaluating the contents of the affidavit, we proceed with our legal analysis aware that the affidavit is not to be interpreted "in a hypertechnical, rather than a commonsense, manner." (United States v. Ventresca, 386 U.S. at 109.) Moreover, "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review." (Illinois v. Gates, 462 US. 213, 236(1983).) Finally, "[a] deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." (Massachusetss v. Upton, 466 U.S. 727(1984).)

SUMMARY OF ARGUMENT

The Fourth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." (Emphasis added.) The search (in the popular sense of the term) of the trash bin did not pertain to Rooney's Fourth Amendment interest in the security of his person. Nor did it pertain to Rooney's interest in the security of whatever is denoted by the term "houses," as used in the Fourth Amendment, since the subterranean garage was not part of his residence or within its curtilage.[12/] Moreover, the search of the communal trash bin did not pertain to Rooney's papers and effects, within the meaning of the Fourth Amendment, because, as

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12. Even were the subterranean garage deemed to have been within the curtilage of Rooney's home, he would not have had a reasonable expectation with respect to it because it was open to the public.

we contend, his garbage[13] when placed in the communal trash bin ceased to be his papers and effects in the sense demanded by the Fourth Amendment, however factually justified his expectation that police officers would not rummage through the contents of the trash bin. For people to have a per se[14] reasonable expectation of privacy with respect to trash, it is a necessary (but not sufficient) condition for that trash to be their papers and effects, within the sense of the Fourth Amendment. On the other hand, trash may be someone's papers and effects, within the sense of the Fourth Amendment, and yet there may not be a legitimate or reasonable expectation of privacy with respect to it because of some other reason.

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13. For purposes of this brief, we shall interchangeably use of terms "trash," "garbage," and "refuse," unless otherwise indicated.

14. We say "per se" to indicate a reasonable expectation of privacy that exists as to an object for a reason other than because it is within someone's house as to which there is a comprehensive expectation of privacy.

It is axiomatic that no person can have a per se Fourth Amendment interest with respect to property abandoned by him, in some particular sense of the term "abandoned." It is generally agreed that the test of whether property is abandoned for Fourth Amendment purposes is not to be determined simply by the application of ordinary property law rules of the jurisdiction in question. It is urged by some that the test of whether an object is abandoned for Fourth Amendment purposes is whether there is no longer a reasonable expectation of privacy with respect to it. However, the term "reasonable" expectation of privacy," as used by this Court in connection with the Fourth Amendment, is a technical term of art. Rather, the appropriate test of abandonment is whether the person, whose effect an object has been, has by some act relinquished so much of his possessory or quasi-possessory interest in it that it can no longer be deemed to be his effect, within the meaning of the Fourth Amendment, without,

however, vesting sufficient possessory or quasi-possessory interests in another person with respect to the object such as to constitute that object the effect of that person in the requisite sense.[15]

The Fourth Amendment protects only those interests it secures against unreasonable invasions of legitimate expectations of privacy. Hence it is misleading, when speaking of the Fourth Amendment, to say that someone has a per se legitimate expectation of privacy as to an object unless it is his or her paper or effect, within the meaning of the Fourth Amendment, as determined independently of that expectation of privacy. When a person terminates so much of his possessory of quasi-possessory interest in an object, without

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15. It is necessary to include this, or some similar proviso, in order to prevent the gift of some property from being deemed abandoned, since the test otherwise would entail too radical a departure from any of the more usual senses of the term. Of course, by the acceptance of a gift, an object also ceases to be the effect of the donor and becomes the effect of the donee.

destroying it, such that it ceases to be his paper or effect in the constitutional sense, without it becoming the paper or effect of another, he is then said to have abandoned it. This act of abandonment ipso facto terminates whatever per se, Fourth Amendment protected reasonable expectation of privacy the actor had previously had with respect to it.

Assuming arguendo that a person so acts so as to significantly diminish the quality and quantity of his possessory or quasi-possessory interest in an object without, however, terminating its status as his or her paper or chattel (in the constitutional sense), the act may nevertheless be sufficient, in the light of surrounding circumstances, to terminate whatever reasonable expectation of privacy he once had with respect to the object in question.

It is submitted that the act of placing garbage in the communal trash bin located in the subterranean garage of a multi-unit apartment building constitutes the abandonment of

that garbage. That is, the placing of the garbage under the circumstances terminates its status as any person's papers or effects in the sense required by the Fourth Amendment. Hence there can be no legitimate expectation of privacy, under the Fourth Amendment, with respect to such garbage.

Alternatively, it is submitted that if the act of placing garbage in the communal trash bin, located in the subterranean garage, of a multi-unit apartment building does not constitute the abandonment of said garbage, the act nevertheless terminates whatever per se reasonable expectation of privacy which had existed with respect to that garbage.

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I.

FOURTH AMENDMENT-ROOTED REASONABLE EXPECTATIONS OF PRIVACY MUST PERTAIN ONLY TO INTERESTS PROTECTED BY THE FOURTH AMENDMENT

This Court declared in Katz v. United States, 389 U.S. 347, 351(1967) that the "Fourth Amendment protects people, not places." However, this Court has explained in Oliver v. United States, 466 U.S. 170, 176 n. 6(1984) that:

> This Court frequently has relied on the explicit language of the Fourth Amendment as delineating the scope of its affirmative protections. See, e.g., Robbins v. California, 453 U.S. 420(1981) (opinion of Stewart, J.); Payton v. New York, 445 U.S. 573, 589-590(1980); Alderman v. United States, 394 U.S. 165, 178-180(1969). As these cases, decided after Katz indicate, Katz' "reasonable expec-

tation of privacy" standard did not sever Fourth Amendment's doctrine from the Amendment's language. Katz itself construed the Amendment's protection of the person against unreasonable searches to encompass electronic eavesdropping of telephone conversations sought to be kept private; and Katz' fundamental recognition that "the Fourth Amendment protects people - and not simple 'areas' - against unreasonable searches and seizures," see 389 U.S., at 353, is faithful to the Amendment's language. As Katz demonstrates, the Court fairly may respect the constraints of the Constitution's language without wedding itself to an unreasoning literalism. In contrast, the dissent's approach would ignore the language of the Constitution itself as well as overturn this Court's governing precedent.

Hence it is the Fourth Amendment's securing of the people against unreasonable searches as to their persons against unreasonable searches and seizures which generates the doctrine that the police may not electronically eavesdrop without a warrant on a conversation conducted in a telephone booth. Clearly, the search (in the popular sense) of the communal trash bin in Rooney's apartment building does not involve any rationally conceivable issue relating to the protection of the Fourth Amendment of Rooney's person against unreasonable searches and seizures.

It is also clear that this search (in the popular sense) of the trash bin did not infringe upon Fourth Amendment interest pertaining to whatever is denoted by the term "houses." In the first place, in no meaningful way can it be said that the subterranean garage was a part of Rooney's house, within the meaning of the Fourth Amendment, or within the curtilage of his residence. This Court has declared in Oliver, 466 U.S. at 180:

> At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," Boyd v. United States, 116 U.S. 616, 630(1886), and therefore has been considered part of the home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors which determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private.

This Court further noted in California v. Ciraolo, 476 U.S. _____ [106 S.Ct. 1809, 1812 (1986) that "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically

and psychologically, where privacy expectations are most heightened."

The subterranean garage, which Rooney shared with the other tenants of the multi-unit apartment complex, was not within the curtilage of his residence. Rooney's apartment was located on the second story, on the northwest end of the apartment building, and thus was not immediately adjacent to the subterranean garage, at the southeast end. (JA 15, 21.) Even if this garage were not accessible to the public, it cannot be rationally deemed to be "an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."

As one State court has stated: "In a modern urban multifamily apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control."[16/]

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16. Commonwealth v. Thomas, 358 Mass.

For this reason, it has been held that an underground common garage of a multi-unit apartment house does not constitute part of the curtilage of a tenant. (United States v. Cruz Pagan, 537 F.2d 554, 558(1st Cir. 1976). See United States v. Stanley, 597 F.2d 866, 870(4th Cir. 1979), holding that the curtilage of an occupant of a mobile home within mobile home park did not include the common area parking lot in which occupant's automobile was parked since his parking space was not annexed to his house or within the general enclosure surrounding his home.) It is of interest that the Court of Appeal in the instant case rejected respondent's contention that the underground garage was within the curtilage of his home.[17] (JA 96-97.)

771, 267 N.E.2d 489, 491(1971) (holding that the cellar of a six-unit apartment building in which tenants had access for washing and other purposes was not within the curtilage of a third story apartment tenant).

17. Some cases have held (without discussing the curtilage issue) that an apartment tenant does not have a reasonable

The Fourth Amendment also secures the right of the people against unreasonable searches and seizures of their papers and effects. The contents of the garbage bag, which contained the papers seized by the officers in the instant case, had been Rooney's papers and effects at one time. However, the critical issue is whether the garbage bag

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expectation of privacy with respect to the underground garage or the basement of the apartment building open to the tenants for various domestic purposes. (See, e.g., United States v. Penco, 612 F.2d 19, 24-25(2d Cir. 1979); United States v. McGrane, 746 F.2d 632, 635(8th Cir. 1984). The California Supreme Court has also held, in People v. Terry, 70 Cal.2d 410, 77 Cal.Rptr. 460, 454 P.2d 36, 47-48(1969), cert. denied, 399 U.S. 911(1970), that the defendant's constitutional right of privacy was not violated when officers entered an apartment house garage, used in common by tenants of the apartment building, and saw in plain sight marijuana on an open ashtray inside the defendant's car. In the instant case, the affidavit read in a commonsense manner indicates that the officers peaceably entered the open underground garage. See supra, at 6, n. 2. However, our argument that Rooney's curtilage did not include the undergound garage of the apartment building is not to be taken as implying that the curtilage of an apartment dweller does not encompass common hallways or other spaces immediately adjacent to his apartment. But, it is not necessary to discuss this subject in this case.

contained Rooney's papers and effects at the time of the officers' examination of the contents of the trash bin. We urge that the legitimate expectation of privacy which the Fourth Amendment protects necessarily pertains only to people with respect to their persons, houses, papers, and effects. A consideration of Oliver v. United States with its discussion of the open fields doctrine, will be helpful in this connection.

In Oliver, this Court considered the viability of the open fields doctrine first enunciated in Hester v. United States, 265 U.S. 57(1924). The Court first noted that "[t]he rule announced in Hester v. United States was founded upon the explicit language of the Fourth Amendment [and t]hat Amendment indicates with some precision the places and things encompassed by its protections." (Oliver, 466 U.S. at 176.) This Court concluded, independently of the reasonable expectation of privacy doctrine, "that the government's intrusion upon the open fields

is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment," having rejected the notion that open fields are either houses or effects, within the meaning of the Fourth Amendment. (Id. at 177.)

After having already concluded that the open fields doctrine is still valid, this Court proceeded to examine whether it is also consistent with the reasonable expectation of privacy doctrine. After an extended analysis, this Court concluded that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." (Id. at 181.) What is of special significance is that this Court then immediately proceeded to consider the contention "that the circumstances of a search sometimes may indicate that reasonable expectations of privacy were violated; and that courts therefore should analyze these circumstances on a case-by-case basis." (Ibid.) This contention was rejected with the terse

statement: "The language of the Fourth Amendment itself answers [this] contention."[18] (Ibid.) This statement is pointless unless it means that the short answer to the contention in question is that open fields are neither houses nor effects within the meaning of the Fourth Amendment. In this connection, we note Mr. Justice White's brief concurring opinion in which he stated: "[T]here is no need to go further and deal with the expectation of privacy matter. However reasonable a land owner's expectation of privacy may be, those expectations cannot convert a field into a 'house' or an 'effect.'" (Id. at 184.)

From the foregoing, we conclude that it would be putting the proverbial cart before the horse were the reasonable expectation of privacy doctrine to be used to determine whether the houses, papers, and effects of

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18. The Court then proceeded to show why a case-by-case approach does not provide "a workable accomodation between the needs of law enforcement and the interests protected by the Fourth Amendment." (Id. at 181.)

some particular person or persons are "houses," "papers," and "effects" within the meaning of the Fourth Amendment.[19]

Suppose, for example, that A sets out an inoperable radio and a sealed trash bag containing pictures for collection at the curb in front of his residence. Using the reasonable expectation of privacy doctrine as the means to determine whether the inoperable radio and the sealed trash bag are A's effects within the meaning of the Fourth Amendment would result in the following: it would be certain that the radio was no longer A's effect, but it might be at least arguable that the contents of the trash bag remained A's effects. Certainly A has no reasonable expectation of privacy as to the radio; but it might be arguable that he has that

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19. The Court noted that "the term 'effects' is less inclusive than 'property,'" and that the "Framers would have understood the term 'effects' to be limited to personal, rather than real, property." (Oliver, 466 U.S. at 177.)

expectation with respect to the contents of the bag. However, it makes more sense to say that both the radio and the bag with its contents remain (or do not remain) the effects of A, in the constitutional sense.

Moreover, this Court presently defines search as being an intrusion of a reasonable expectation of privacy. (United States v. Jacobson, 466 U.S. 109, 113(1984).) Consider then the language of the Fourth Amendment in that it secures the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. If the reasonable expectation of privacy doctrine is used to determine whether a certain object is A's effect and the conclusion is that A has a reasonable expectation of privacy with respect to that object, it follows that A has the Fourth Amendment right to be secure in this object because he has a reasonable expectation of privacy against a search, which in turn is defined as an intrusion of the reasonable expectation

of privacy. There appears to be some redundancy here.

It might well be objected that, as this Court declared in Katz, that "The Fourth Amendment protects people - and not simple 'areas' - against unreasonable searches and seizures." (389 U.S. at 353.) Therefore, it might be urged, whether or not an object is someone's effect to be considered as per se protected by the Fourth Amendment, that Amendment nevertheless protects people with respect to any object of a legitimate expectation of privacy. In the first place, the Fourth Amendment protects people in their persons, houses, papers and effects. Katz can be misread, but the fault is that of the reader, and not of the Court. Thus, for example, this Court has declared: "The simple language of the Amendment applies equally to seizures of persons and to seizures of property." (Payton v. New York, 445 U.S. 573, 585(1980).) The opinions of this Court are thankfully free of indications that the expression "reasonable

expectation of privacy" is to serve as just as much "a talismanic solution to every Fourth Amendment problem" as the expression "constitutionally protected areas." (Katz, supra, at 351 n. 9.)

The Court is quite right in rejecting the notion that it is appropriate "to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." (Jones v. United States, 362 U.S. 257, 266(1960).) But surely people must have sufficient possessory or quasi-possessory interests with respect to houses, papers, and effects in order to meaningfully say that these are their houses, papers, and effects, within the meaning of the Fourth Amendment. Once having determined that a person has sufficient possessory or quasi-possessory

interests in an object such that it can be meaningfully said that it is his effect, within the meaning of the Fourth Amendment, it only then becomes appropriate to consider whether he has, under the circumstances, a reasonable or legitimate expectation of privacy with respect to it grounded upon Fourth Amendment values. Thus, for example, in Rawlings v. Kentucky, 448 U.S. 98(1980), this Court rightfully held that Rawlings did not have a legitimate expectation of privacy with respect to his drugs found in Cox's purse. According to our analysis, the drugs that were placed in Cox's purse remained Rawlings' effects; but he did not have a sufficient possessorial or quasi-possessorial interest in Cox's purse to meaningfully say that it was his purse as well as that of Cox. Rawlings could not have a legitimate expectation of privacy as to the drugs within Cox's purse simply because they were not within a closed container provided by him and by which

his privacy interest could be manifested.[20] If, on the other hand, it is urged that the test by which we determine whether Rawlings' drugs were his effects when placed in Cox's purse is by the use of the reasonable expectation of privacy doctrine, it follows, given the ultimate result in Rawlings, that he, Rawlings, had no reasonable expectation of privacy as to the drugs in Cox's purse, because these drugs ceased to be his effects, within the meaning of the Fourth Amendment, when he placed them in Cox's purse. This, it

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20. By way of contrast, compare: Jones v. United States, where the defendant was arrested in an apartment which belonged to a friend, who had given him the use of it, and a key, that he paid nothing for the use of the apartment, and that the friend was away for about five days; United States v. Jeffers, 342 U.S. 48(1951), where police unlawfully searched a hotel room rented by defendant's two aunts, but who had given him a key and had given their permission for him to use for room at will, and that he often entered the room for various purposes. As this Court explained in Rakas v. Illinois, 439 U.S. 128, 143 n. 12(1978): "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [others]."

respectfully submitted, is nonsense-on-stilts since it may be presumed that Rawlings intended that they be returned by Cox to him at some convenient time at his request.

II.

RESPONDENT LOST HIS FOURTH AMENDMENT INTEREST IN HIS GARBAGE BECAUSE HE ABANDONED IT BY PLACING IT IN THE COMMUNAL TRASH BIN

It must be taken as certain that a person loses his Fourth Amendment interest in his papers and effects when he has abandoned them. (Hester v. United States, 265 U.S. at 58; Abel v. United States, 362 U.S. 217, 224-225, 240-241(1960); Rios v. United States, 364 U.S. 253, 254, 252 n. 6(1960).) Obviously, the term "abandoned" must be understood in an appropriate sense. The question is what is this appropriate sense.

A number of federal and state cases have stated or intimated that the appropriate test of abandonment, for Fourth Amendment purposes, is grounded upon the reasonable expectation of

privacy doctrine.[21] This is quite understandable since virtually all the courts deciding these cases found themselves under the

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21. See, e.g., United States v. Biondich, 652 F.2d 743, 745(8th Cir.1981), cert. denied, 454 U.S. 975(1981); United States v. Colbert, 474 F.2d 174, 176(5th Cir.1973); United States v. Crowell, 586 F.2d 1020, 1025(4th Cir.1978), cert denied, 440 U.S. 959(1979); United States v. Hershenow, 680 F.2d 847, 856(1st Cir.1982); United States v. Jackson, 448 F.2d 963, 971 (9th Cir.1971), cert denied, 405 U.S. 924 (1972); United States v. Katsaris, 684 F.2d 758, 761(11th Cir.1982); United States v. Michaels, 726 F.2d 1307, 1312(8th Cir.1984), cert. denied, 469 U.S. 820(1984); United States v. Reicherter, 647 F.2d 397, 399(3rd Cir.1981); United States v. Shelby, 573 F.2d 971, 973(7th Cir.1978), cert. denied, 439 U.S. 841(1978); United States v. Vahalik, 606 F.2d 99, 101(5th Cir.1979), cert. denied, 444 U.S. 1081(1980). For some state cases, see, e.g., Commonwealth v. Cihylik, 337 Pa.Super. 221, 486 A.2d 987, 990(1985); Croker v. State, 477 P.2d 122, 125(Wyo. 1970); People v. Collins, 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267, 279(1985), cert. denied, _____ U.S. _____ [106 S.Ct. 267(1985); People v. Krivda, 5 Cal. 3d at 364-365, 486 P.2d at 1267; State v. Brown, 20 Ohil. App.3d 36, 484 N.E.2d 215, 218(1984); State v. Fassler, 108 Ariz. 586, 503 P.2d 807, 814(1972); State v. Oquist, 327 N.W.2d 587, 590 (Minn. 1982); Smith v. State, 510 P.2d 793, 797(Alaska 1973); State v. Schultz, 388 So.2d 1326, 1327(Fla.Dist.Ct.App. 1980); State v. Stevens, 123 Wis.2d 303, 367 N.W.2d 788, 795(1985), cert. denied, _____ U.S. _____ [106 S.Ct. 151(1985); Venner v. State, 279 Md. 47, 367 A.2d 949, 952(1977), cert. denied, 431 U.S. 932(1977)

compulsion of Katz and its progency, which appeared to indicate that the determination whether a person had a Fourth Amendment interest was exclusively controlled by whether or not he had a reasonable expectation of privacy. However, as we have seen, this Court in Oliver has clearly signaled that the reasonable expectation of privacy doctrine is not without limitation, and that that limitation is provided by the Fourth Amendment itself, which secures the people against unreasonable searches and seizures only with respect to whatever are denoted by the terms "persons," "houses," "papers," and "effects," as used in that Amendment.

As we have already argued, a person cannot have a Fourth Amendment rooted legitimate expectation of privacy except as to an interest secured by that Amendment. Therefore, the appropriate test for abandonment cannot be by virtue of the application of the legitimate expectation of privacy doctrine since otherwise the application of that doctrine provides

the means by which the interests secured by that Amendment are to be identified.

The proper application of the legitimate expectation of privacy doctrine is to be presently understood as presupposing that the person complaining of a Fourth Amendment violation has an interest secured by that Amendment at issue. It behooves us to now look at those few cases decided by this Court which involve abandonment.

In Hester v. United States, this Court held that revenue officers without violating the Fourth Amendment, entered upon the open fields near the house of Hester's father. After an alarm was given, one officer pursued Hester and one Henderson, and fired his pistol. Hester dropped the jug he had been carrying, and it broke. Henderson threw away the bottle which Hester had been seen by the officers to have previously given him. The jug and bottle both contained what the officers recognized as moonshine whisky. Another jar, found outside the house and that had been thrown out

and broken, also contained whiskey. This Court concluded: "The defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle; and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned." (265 U.S. at 58.) Although, given the open fields doctrine, no reasonable expectation of privacy was violated, Hester is of significance to us as indicating that the jug, the jar, and the bottle were deemed abandoned by this Court albeit that these items were discarded by Hester and his associates on the real property belonging, presumably, to Hester's father. Therefore, it must be concluded that whatever possessory or quasi-possessory interests Hester and his associates respectively had in these items, prior to having been thrown away, which constituted them as the effects of these men (within the meaning of the Fourth Amendment), were terminated when the items were thrown away by them.

In Abel v. United States, the relevant facts are as follows: After Abel checked out of the hotel, an F.B.I. agent, securing the hotel management's permission to search the room just vacated by Abel, conducted a search of that room. Among other things, he seized the contents of the wastepaper basket. This Court characterized the search of the wastepaper basket and the seizure of its contents as follows (362 U.S. at 241):

> [A]t the time of the search petitioner had vacated the room. The hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made. Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned,

they were bona vacantia. There can be nothing unlawful in the Government's appropriation of such abandoned property.

By way of contrast, this Court declared in Rios v. United States, 364 U.S. at 262 n. 6: "A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have 'abandoned' it. An occupied taxicab is not to be compared to an open field, Hester v. United States, 265 U.S. 57, or a vacated hotel room, Abel v. United States, 362 U.S. 217."

Since these cases, this Court has provided virtually no explicit guidance with respect to the concept of abandonment for Fourth Amendment purposes.

Because the critical issue is whether Rooney's Fourth Amendment interest has been violated by the examination of the trash bin in his apartment building garage, resolution of that issue must ultimately depend upon whether his garbage (in the sense that the

garbage came from him) were his effects (in the sense of the Fourth Amendment) at the time the officers examined the contents of the trash bin. Hence one prong of the test as to whether a person has abandoned an object for Fourth Amendment purposes is whether that possessory or quasi-possessory interest which he had with respect to the object in question and by virtue of which was effect (for Fourth Amendment purposes) was terminated by some action on his part or on his behalf. On the other hand, a person also terminates his Fourth Amendment interest in some object when it is actually accepted as a gift by another person. Hence, essential to the notion of abandonment is that no other person has acquired the object as his effect for Fourth Amendment purposes). When a person, for example, throws away an object with the requisite intent, thereby terminating its status as his effect (for Fourth Amendment purposes), it does not <u>ipso facto</u> become the effect of the owner of the land upon which the object lands

merely because, as a matter of the property law of the jurisdiction in question, the land owner acquires title and the right of possession to the discarded object. In the instant case, Rooney's garbage was placed in the communal trash bin with a state of mind so that the garbage ceased to be Rooney's effects (for Fourth Amendment purposes). But we would also urge that it did not become ipso facto the effects (for Fourth Amendment purposes) of the owner or manager of the apartment house. Hence, we submit, that the garbage was abandoned when it was placed in the communal trash gin, albeit the trash bin itself was the effect (in the constitutional sense) of the apartment house owner and/or manager. Similarly, to assert that a person abandons his garbage whenever he puts it out at the curb for collection in a public place or a place open to the public, implies that such garbage on the curb is no person's effect (for Fourth Amendment purposes) for the time being.

When a person discards trash, such that it ceases to be his effect (for Fourth Amendment purposes), it may well be the case that, in a given situation, he may have a well justified belief that police will not, in all probability, examine the trash. He may also expect that in the ordinary course of events the trash will be picked up by authorized trash collectors, who will take the trash and dispose of it without examining it. He may even discard the trash with the state-of-mind such that he would not have done so were there any substantial probability that police would examine his trash. Nevertheless, when a person discards trash with the present intention of not retrieving it and sets it out for collection, or deposits it outside his home and its curtilage, such trash must be taken as having ceased to be his effects (for Fourth Amendment purposes). Because the trash has ceased to be his effects, he cannot be deemed to have any <u>per se</u> legitimate expectation with respect to it.

Our analysis is supported by a signficant number of cases, which include:

In Magda v. Benson, 536 F.2d 111(6th Cir. 1976), the court held that garbage placed for collection on a treelawn next to a street "is abandoned and no longer protected by the Fourth Amendment." (Id. at 112.) Moreover, "no legitimate expectation of privacy exists as to abandoned property." (Id. at 113.)

In United States v. Alden, 576 F.2d 772 (8th Cir.1978), cert denied, 439 U.S. 855(1978) the court declared: "Because no one owns or possesses abandoned property, no one can claim a Fourth Amendment interest in it." (Id. at 777.) The court explained: "The very notion of abandonment, however, implies a renunciation of any reasonable expectation of privacy."22/

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22. In this case, items found by police near or in a pile of partially burned trash, apparently within the curtilage of appellant's residence, was considered by the trial court as abandoned since the seized items had been placed in the trash pile for burning or other disposal, and there was no evidence of an intent to retain anything in the pile. The appellate court declared: "On these facts, we

The court in United States v. Dzialak, 441 F.2d 212(2d Cir.1971), cert. denied, 404 U.S. 883(1971), declared (with respect to a cardboard box, and its contents, set out as trash between the sidewalk and street in front of appellant's home): "[W]e think it abundantly clear that Dzialak abandoned the property. The town ordinance [which prohibited anyone except authorized municipal authorities to rummage into, pick up, collect, move or otherwise interfere with articles or materials placed on the right of way of any public street for collection] simply cannot change the fact that he 'threw [these articles] away' and thus there 'can be nothing unlawful in the Government's appropriation of such abandoned property.'" (Id. at 215.)

In United States v. Kramer, 711 F.2d 789 (7th Cir.1983), the court declared: "the special protection the Fourth Amendment

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cannot say that the district court's finding of abandonment was clearly erroneous." (Ibid.)

accords people in 'their persons, houses, papers, and effects' does not extend to their discarded garbage," placed by defendant by the roadside in front of his house to be collected by a private garbage removal service. (Id. at 792.) Although this court also contained a reasonable-expectation-of-privacy analysis, it also observed that "[f]or present purposes, an expectation of privacy is simply an interest protected by the Fourth Amendment." (Id. at 793.)

The court in United States v. Mustone, 469 F.2d 970(1st Cir.1972) held that a defendant abandoned two trash bags when he deposited them on the sidewalk near some garbage cans several doors away from the storefront office from which he had emerged. The court declared: "Implicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy in the property abandoned. The contrary suggestion strikes us as anomalous." (Id. at 972.)

Another pertinent case is People v. Huddleston, 38 Ill.App.3d 277, 347 N.Ed.2d 76 (1976), which held that defendant abandoned his trash, contained in two plastic bags, when he deposited them at the curbside in front of his residence for pickup collection, "in the sense that he demonstrated an unequivocal intention to part with it forever." (Id. at 80.) Accordingly, "[a] person who abandons property no longer has a 'reasonable expectation' of freedom from governmental intrusion into the area, or from governmental appropriation of the abandoned property." (Ibid.)

Even some courts which maintain that the controlling test of whether a person's Fourth Amendment right has been violated with respect to discarded garbage is to be independently determined by the reasonable expectation of privacy doctrine, under compulsion of Katz as understood by them, make it clear (to quote from one opinion) that "the sequence of an individual's placing an article in a receptacle, from which routine municipal collections

are made, and then withdrawing from the area [is] activity clearly indicative of 'an intention to relinquish all title, possession, or claim to property,'" and hence an abandonment. (Smith v. State, 510 P.2d 793, 796 (Alaska 1973). See also State v. Oquist, 327 N.W.2d at 590; United States v. Kahan, 350 F.Supp. 784, 795-796(S.D.N.Y. 1972), reversed on other grounds, 479 F.2d 290(2d Cir. 1973), reversed with directions to reinstate the district court judgment, 415 U.S. 239 (1974).)

We respectfully submit that the rule that should be authoritatively adopted by this Court is that an object is abandoned when it is discarded, thrown away, or otherwise disposed of under circumstances which demonstrate the "unequivocal intention to part with it forever," but before another person can be meaningfully said to have acquired the trash.

It is contended by some, for example, by the California Supreme Court in Krivda, 5 Cal. 3d at 366, 486 P.2d at 1268, that a partial

abandonment is insufficient, that "[t]he placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public." Of course, the definition of "abandonment" within the law of a particular jurisdiction may be such that no object is deemed abandoned unless accompanied by an indifference as to who thereafter acquires the object. Nevertheless, a person who discards, throws away, or otherwise disposes of an object with an intent to forever part with it and who desires or expects that it will be acquired by a particular person, and no other, is in a position functionally equivalent to that of a person who discards, throws away, or otherwise disposes of an object with an intent to forever part with it and who is indifferent as to who thereafter acquires the object. In either case, there is an effective loss of possessory or quasi-possessory control.

The case of a so-called partial abandonment is very similar to those instances where

a person delivers an object to another with instructions to the recipient to destroy or discard the same. For example, in Commonwealth v. Richardson, 476 Pa. 571, 383 A.2d 510(1978), cert. denied, 436 U.S. 910(1978), defendant gave an earring to another person with the instruction to flush it down the toilet. The Pennsylvania Supreme Court declared that defendant "relinquished or abandoned" the earring. The court concluded that defendant "had relinquished any possessory interest in the property in question and therefore his Fourth Amendment rights were in no way violated by the seizure of these items." (Id. at 517.) Similar cases include United States v. Cella, 568 F.2d 1266(9th Cir.1977), where negatives and pasteups of incriminating invoices given by accused tax evaders to an employee with orders to destroy them were deemed to have been abandoned. In United States ex rel. Fein v. Deegan, 298 F.Supp. 359 (S.D.N.Y. 1967), aff'd 410 F.2d 13(2d Cir.1969), cert. denied 395 U.S. 935(1969), the court

considered a situation where the petitioner told his friend, Gloria, to "[g]et rid of all the furniture, and get rid of the rug; get rid of everything' in his apartment the day of the murder of which he stood convicted. He was insistent that she quickly dispose of all the furniture, and when she was proceeding too slowly he said, apparently to prod her, "Just get rid of it. I don't care what you do with it." The friend disposed of the rug and a television set, and stored the rest of the furniture in a warehouse. The court stated "[i]t appears abundantly clear that the last thing petitioner wanted was a possessory interest in these articles, or any connection with them," and that he "had abandoned the property, as much as if he had thrown it into a public wastepaper basket." (Id. at 365.) Although, according to our proposed definition, an abandonment did not take place because the furniture became Gloria's effects, this case, as well as the two cases just discussed, indicate that when A gives an article to B with

instructions to destroy or otherwise discard it, this bailment is insufficient to preserve that possessory or quasi-possessory interest in the article such that it remains A's effect, within the meaning of the Fourth Amendment. A bailment for destruction, if you please, is quite different from a bailment for storage or for delivery to another person. The person who provides the article for storage or for delivery to another retains a sufficient possessory or quasi-possessory interest in the article such that it continues its status as his effect (for Fourth Amendment purposes), although it also becomes the effect of the bailee. Whether or not, however, the bailor and/or bailee has a legitimate expectation of privacy will depend upon the circumstances, including, for example, whether the article is within a closed container.[23/]

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23. See United States v. Jacobson, 466 U.S. at 120 n. 17: "a container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant."

Hence trash placed for collection outside the curtilage of his residence, with the intent that only the trash collector take possession of it and that no person examine it, becomes the subject of a bailment for destruction once the collector acquires it. But until the collector acquires the trash, it is no one's effect within the meaning of the Fourth Amendment. Once the collector acquires the trash, it may be said to become the collector's effect (assuming arguendo that the trash can becomes an effect in the constitutional sense since the collector possesses it only with the intent to discard it), but it does not somehow also become again the effect (for Fourth Amendment purposes) of its former owner. On the other hand, when a person, instead of depositing trash for collection at the curb in front of his residence, directly delivers the trash to the trash collector, there has been no abandonment (as we have defined it). However, there is now a bailment for destruction. Upon delivery of the trash to the bailee, it

has ceased to be the effect of the bailor even though, as a matter of state law, he may continue to have some property interest in the trash.

The mere fact that trash is within a closed container does not vest it with a constitutionally protected status. This is surely the case where the container, such as an ordinary plastic bag, is itself intended to be discarded and is a constituent part, therefore, of trash.[24]

On the other hand, the homeowner does not intend that the trash collector take the metal or plastic garbage can. Whether or not covered, a permanent trash can cannot be a container which supports a reasonable expectation of privacy given that trash deposited for collection or placed in a communal trash bin has ceased to be anyone's effect for Fourth

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24. See Texas v. Brown, 460 U.S. 730 (1983), in which it was held that seizure of a balloon reasonably suspected of containing an illicit substance did not violate the Fourth Amendment under the plain view doctrine.

Amendment purposes. (See United States v. Jacobson, 466 U.S. at 120 n. 17.) Moreover, the closed permanent trash container, sitting out on the street awaiting the arrival of the trash collector, or sitting in the common subterranean garage of an apartment house, falls within the class of those "containers (for example a kit of burglar tools or a gun case) [which] by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." (Arkansas v. Sanders, 442 U.S. 753, 764 n. 13(1979).) As to such containers, a warrantless search is not in violation of the Fourth Amendment since there is no Fourth Amendment interest in their contents. (United States v. Ross, 456 U.S. 798, 814 n. 19(1982); Texas v. Brown, 460 U.S. at 750-751 (Stevens, J., concurring).)

It is not our intent to question the proposition that there is a Fourth Amendment interest with respect to trash within houses (as that term is used in the Amendment),

including the curtilages of private residences. In the first place, in many cases the mere deposit of trash into a wastepaper basket, or other trash container, within the home or an office, may not, under the circumstances, demonstrate an unequivocal present intend to forever terminate one's possessory or quasi-possessory interest in the trash. Unlike the deposit at the curb of trash for collection, there are many instances where the deposit of trash in a wastepaper basket is provisional in nature. In other instances, the placing of an item may, under the circumstances, more easily give rise to the inference that there has been an intent to conceal rather than to abandon. (See, e.g., Work v. United States, 243 F.2d 660, 663(D.C. Cir.1957); State v. Chapman, 250 A.2d 203, 212(Me. 1969).)

But, more generally speaking, it must be remembered that "searches and seizures inside a home are presumptively unreasonable." (Payton v. United States, 445 U.S. at 587.) Whether or not an article of trash

is deemed to be an effect for Fourth Amendment purposes, there is a separate Fourth Amendment interest in one's own house. As this Court so eloquently declared in Alderman v. United States, 394 U.S. at 176-177:

> If the police make an unwarranted search of a house and seize tangible property belonging to third parties - even a transcript of a third-party conversation - the homeowner may object to its use against him, not because he had any interest in the seized items as "effects" protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment. [Footnote omitted.]

Hence several cases have held that the inspection of trash containers within the curtilage may, under the circumstances, violate the Fourth Amendment in the absence of a reasonable

expectation of privacy.[25] However, when trash, whether or not within the curtilage, has been taken by the authorized trash collector (and despite any arrangement with the police to permit their inspection of it), the trash ceases to be the effect (for Fourth Amendment purposes) of its former owner.[26]

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25. These cases include: Ball v. State, 57 Wis.2d 653, 205 N.W.2d 353, 356-357(1973); State v. Chapman, 250 A.2d at 212; People v. Edwards, 71 Cal.2d 1096, 1104, 80 Cal.Rptr. 633, 458 P.2d 713, 718(1969); United States v. Long, 449 F.2d 288, 294(9th Cir.1971), cert. denied, 405 U.S. 974(1972); Work v. United States, 243 F.2d at 662. Of course, it is possible for a person to have no reasonable expectation of privacy with respect to trash placed for collection within the curtilage, depending upon the location of the trash and other circumstances. In any event, it is clear that the curtilage of Rooney's residence did not extend to the common underground garage of his apartment building. Of course, the garage is within the apartment building considered as the house which belongs to the owner and/or manager and considered as such, and who is not simply another resident occupant of the building.

26. For cases supporting this proposition, or that there is no reasonable expectation of privacy with respect to such collected trash, see, e.g., United States v. Biondich, 652 F.2d at 744-745; United States v. Crowell, 586 F.2d at 1025; United States v. Sumpter, 669 F.2d 1215, 1221(9th Cir.1982); Croker v. State,

III.

RESPONDENT RELINQUISHED WHATEVER LEGITIMATE EXPECTATION OF PRIVACY HE HAD IN HIS GARBAGE WHEN HE PLACED IT IN THE COMMUNAL TRASH BIN

Our argument as to this point can be quite brief: By abandoning his trash, Rooney relinquished whatever legitimate expectation of privacy he once had with respect to it. However, a decent respect for the opinions of mankind compels us to quickly state our reasons for also concluding that respondent relinquished whatever legitimate expectation of privacy he once had with respect to his trash by placing it in the communal trash bin, assuming arguendo that the test of abandonment is provided by the reasonable-expectation-or-privacy doctrine.

Candor compels us to concede that in some intellectually respectable sense of the term,

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477 2d at 125; State v. Stevens, 367 N.W.2d at 794-797.

"reasonable expectation of privacy" can be so used that indeed a prudent, law-abiding person may arguably be said to have a reasonable expectation of privacy with respect to garbage placed in a communal trash bin when he intends and desires, and reasonably anticipates, that police will not examine the contents of the trash container. However, this concession is not the end of our analysis but rather its beginning. This is so, it is our contention, because this Court has made it quite clear that the term "reasonable expectation of privacy" is to be understood as a technical term of art, in a sense somewhat different than that just indicated, such that a prudent, law-abiding person does not have a reasonable expectation of privacy with respect to garbage in a sealed container just because he has a well-grounded expectation that police will not examine the contents of that container.

The significance of the term "reasonable expectation of privacy" arose in Katz . In Katz this Court held that Government agents

violated the Fourth Amendment when they intercepted the contents of a telephone conversation by attaching an electronic listening devise to the outside of a public phone booth. This Court insisted that "the Fourth Amendment protects people, not places." (389 U.S. at 351.) This Court also rejected the suggestion that the concept of constitutionally protected areas "can serve as a talismanic solution to every Fourth Amendment problem." (Id. at 351 n. 9.) The Court concluded that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." (Id. at 353.) However, this Court cautioned (id. at 35 -351, footnote omitted) that:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against

> certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a persons's general right to privacy - his right to be let alone by other people - is, . . . left largely to the law of the individual states.

Justice Harlan, in his concurring opinion, expressed his understanding "that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." (Id. at 361.)

In Terry v. Ohio, 392 U.S. 1, 9(1968), this Court broadly stated:

> We have recently held that "the Fourth Amendment protects people, not places," Katz v. United States,

> 389 U.S. 347, 351(1967), and wherever an individual may harbor a reasonable "expectation of privacy," (id. at 361 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion.

In Rakas v. Illinois, this Court insisted that Fourth Amendment rights are personal in nature, and that the inquiry "whether the challenged search or seizure of a criminal defendant who seeks to exclude the evidence obtained during it [requires] a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." (439 U.S. at 140.) But this Court additionally asserted the position, traced back to Katz, "that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of

privacy in the invaded place." (Id. at 143.)

Of significance to us is the Court's following exposition in Rakas of the meaning of "legitimate expectation of privacy." This Court declared (id. at 143 n. 12):

> Obviously, however, a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. . . . And it would, of course, be merely tautological to fall back on the notion that those expectations or privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attached to property is

> the right to exclude others. . . , and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. . . . [E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.

According to this Court in United States v. Jacobson, 466 at 122, "[t]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the

authorities." (Footnote omitted.) As this Court further explained in Oliver, 466 U.S. at 182-183: "The test of legitimacy [of expectation of privacy] is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." (Footnote omitted.) Thus the term "reasonable expectation or privacy," as used

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by this Court in connection with the Fourth Amendment, does not entail the proposition that a person, however prudent and law-abiding, has a reasonable expectation of privacy merely because he has a factually justified expectation that the police will seek out to discover information or objects desired to remain private. Additionally, the meaning of the term in question must be ultimately grounded upon the Fourth Amendment itself. As this Court noted in Oliver v. United States: "Katz 'reasonable expectation of privacy' standard did not sever Fourth Amendment doctrine from the Amendment's language." (466 U.S. at 176 n. 6.)

It is not unusual at all for legal literature to use a term which has a technical sense different from, although related to, the one or more popular senses of the term in question. Thus, for example, "[t]his Court has held that the word 'houses,' as it appears in the [Fourth] Amendment, is not to be taken literally, and that the protection of the

Amendment may extend to commercial premises." (Mancusi v. DeForte, 392 U.S. 364, 367(1968), just as it does to apartments,[27] hotel and motel rooms,[28] and rooms in rooming houses.[29] Another example is the term "open field" used in connection with the open fields doctrine. As this Court put: "An open field need be neither 'open' nor a 'field' as those terms are used in common speech. For example, . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." (Oliver, 466 U.S. at 180 n. 10.) In the popular sense of the term, there can be no doubt that the officers in the instant case searched the communal trash bin of Rooney's apartment building. On the other hand, this Court currently defines "search"

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27. E.g., Clinton v. Virginia, 377 U.S. 158(1964).

28. E.g., Stoner v. California, 376 U.S. 483(1964).

29. E.g., McDonald v. United States, 335 U.S. 451(1948).

as occurring when an expectation of privacy that society is prepared to consider reasonable is infringed. (United States v. Jacobsen, 466 U.S. at 113; Illinois v. Andreas, 463 U.S. 765, 771(1983).)

Of course, there is nothing improper for legal literature to use technical terms of art, verbally identical with popular terms which have different meanings. Such is the case, it is evident, with the term "reasonable expectation of privacy" when used by this Court on connection with Fourth Amendment issues. Hence no argument addressed to this Court can afford to ignore the fact that there has been an evolution in the meaning of the term "reasonable expectation of privacy" as used by this Court since Katz. "Reasonable" (or "legitimate") "expectation of privacy" has become, as used by this Court, a technical term of art for analysis of Fourth Amendment issues.

No one would presumably deny that, according to the Court of Appeal in its opinion in the instant case,

"a tenant who places trash in a communal trash bin possesses less of a privacy expectation than one who places trash in a privately owned trash can. . . ." (JA 86. See also: People v. Stewart (34 Cal.App.3d 695, 700, 110 Cal. Rptr. 227(1973); Ingram v. State, 703 P.2d 415, 427(Alaska Ct.App.1985), aff'd. by 719 P.2d 265(Alaska 1986).) By placing the trash within the communal trash bin, Rooney assumed the risk that his trash might be examined by fellow tenants of his apartment building or by its owner and/or manager or his agents, or by their visitors, the trash collectors, as well as by other persons entering the garage rightly characterized by the Court of Appeal as an area accessible to the public. To argue that a simple expectation that the police (unlike apartment occupants, their visitors, transients, and others) will not, in all likelihood, examine the contents of the trash bin is a legitimate expectation of privacy is to commit the error condemned by this Court in Rakas, 439 U.S. at 143 n. 12:

> And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others. . . .

Any expectation of privacy which Rooney entertained pertained to a container (i.e., the trash bin) which did not even belong, in any remote sense, to him, and which he used in common with many other persons.

Just as the occupant of a dwelling can take reasonable precautions to minimize visual surveillance by drawing the shades, curtains,

or blinds, so too a person concerned with the privacy of his trash can ordinarily minimize the hazard of discovery of matters which he desires to keep secret by shredding papers, flushing some items down the toilet, burning other items in the fireplace, or putting some in a garbage disposal unit. The person who disposes of papers by including them with his trash and putting the same out at the curb for collection has even less of a claim that he has a reasonable expectation of privacy then one who voluntarily gives his papers to another, albeit with the understanding that the contents will be kept confidential. If, as this Court has consistently maintained, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" (Smith v. Maryland, 442 U.S. 735, 744(1979)), he can have no legitimate expectation of privacy in papers which contain that information which are voluntarily given to third parties.

This is the case whether or not an ordinance prohibits persons other than trash collectors from rummaging in, or otherwise disturbing trash set out for collection. Such ordinances do not establish the legitimacy of expectation of privacy for Fourth Amendment purposes. They may serve several purposes: such as to protect the economic interest of the trash collectors with respect to their exclusive privilege to collect trash, or the interest in cleanliness, or sanitation, or simply to satisfy public demand that trash set out for collection not be disturbed.[30/] Indeed, placing trash in closed, opaque containers, such as plastic bags, "are obviously desinged to assure tidiness in appearance rather than privacy." (United States v. Terry, 702 F.2d

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30. See: United States v. Vahalik, 606 F.2d at 101 ("The purpose of the ordinance was, presumably, sanitation and cleanliness, not privacy."); cf. Magda v. Benson, 536 F.2d at 112-113; United States v. Dzialak, 441 F.2d at 215. Both cases summarily find such ordinances as irrelevant for Fourth Amendment purposes.

299, 309(2d Cir.1983), cert. denied, 464 U.S. 992(1983).)

If a trash can or other container supports a reasonable expectation of privacy, it cannot be lawfully searched, even on probable cause, without a warrant. (See United States v. Jacobson, 466 U.S. at 120 n. 17.) And if this is the case, the immunity of the trash container from a warrantless search survives as long as the container supports a reasonable expectation of privacy, even unto the garbage dump or the landfill. Surely, this is a reductio ad absurdum.[31/]

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31. We wonder about whether the California Supreme Court would have ruled as it did in Krivda had it realized that a warrantless search of a container supporting a reasonable expectation of privacy cannot be searched, albeit there is probable cause. Yet that court had indicated that a warrantless search, but one supported by probable cause, of a trash can set out for collection is valid under the Fourth Amendment. (See People v. Dumas, 9 Cal. 3d 871, 884, 109 Cal.Rptr. 304, 512 P.2d 1208, 1217(1973).) Nevertheless, this indication relied upon in People v. Parker, 44 Cal.App.3d 222, 229, 231, 118 Cal.Rptr. 523(1974), People v. Stewart, 34 Cal.App.3d at 700, and by the Court of Appeal in the instant case (JA 88-90).

CONCLUSION

It would surely be anomalous were this Court to find that Rooney had a Fourth Amendment interest in his discarded garbage notwithstanding the fact that the overwhelming majority of jurisdictions, which have considered the matter, have concluded that there is no Fourth Amendment interest in trash set out for collection, collected by authorized collectors, or placed in communal trash containers.[32]

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32. Magda v. Benson, 536 F.2d at 112 (trash set out for collection); United States v. Biondich, 652 F.2d at 744-745(trash collected); United States v. Crowell, 586 F.2d at 1024-1025(trash collected); United States v. Dela Espriella, 781 F.2d 1432, 1437(9th Cir. 1986)(trash set out for collection); United States v. Dzialak, 441 F.2d at 215(trash set out for collection); United States v. Kramer, 711 F.2d at 792-793(trash set out for collection); United States v. Michaels, 726 F.2d at 1312-1313(trash in communal trash container); United States v. Minker, 312 F.2d 632, 634-635 (3d Cir.1963), cert. denied, 372 U.S. 953 (1963)(trash collected); United States v. Reicherter, 647 F.2d at 399(trash set out for collection); United States v. Shelby, 573 F.2d at 793-794(trash set out for collection); United States v. Sumpter, 669 F.2d at 1221 (trash collected); United States v. Terry, 702 F.2d at 308-309(trash set out for

The Constitution, independently of the Fourth Amendment as applied to the States by the Fourteenth Amendment, does not establish any right of privacy such that it includes among its components the right that police not examine the trash set out for collection or placed in a communal trash bin in a multi-unit apartment building. (See Paul v. Davis, 424

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collection); United States v. Vahalik, 606 F.2d at 100-101(trash set out for collection). Additionally, the courts in United States v. O'Bryant, 775 F.2d 1528, 1533(11th Cir.1985), United States v. Mustone, 469 F.2d 970, 972-973(1st Cir.1972), and United States v. Thornton, 746 F.2d 39, 49 & n. 11(D.C. Cir. 1984), approvingly noted the general rule that there is no reasonable expectation of privacy as to trash discarded outside the home and its curtilage.

State cases include: Croker v. State, 477 P.2d at 123-126(trash collected); Commonwealth v. Chappee, 397 Mass. 508, 492 N.E.2d 719, 721-722(1986)(trash set out for collection); People v. Collins, 478 N.E.2d at 278-279(trash set out for collection); People v. Huddleston, 347 N.E. 2d at 78-81(trash set out for collection); Sims v. State, 425 So.2d 563, 568 (Fla.Dist. Ct.App.1982)(trash set out for collection); Smith v. State, 510 P.2d at 794-799(communal trash bin set out for collection); State v. Brown, 484 N.E.2d at 216-218(trash set out for collection); State v. Fassler, 503 P.2d at 813-814(trash set out for collection); State v. Oquist, 327 N.W.2d at 591(trash set out for collection); State v. Schultz, 388 So.2d at 1329(trash set out for collection).

U.S. 693, 712-713(1976), holding that the constitutional right of privacy, excluding Fourth Amendment interests, does not include the right that the State not publicize a record of an official act such as an arrest.)

We would be belaboring the obvious that trash set out for collection or deposited in communal trash bins can hardly be considered among those effects which the founders of the Bill of Rights intended to protect against unreasonable searches and seizures. We persist in our view, expressed in our petition for writ of certiorari, that "[w]hen garbage is placed in a trash bin, it continues to be garbage when it is taken out." (Id. at 26.) The instant case "give[s] this Court an opportunity to make it clear that the Fourth

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Amendment was adopted for more noble purposes than the protection of discarded garbage." (Id. at 27.)

Respectfully submitted,

IRA REINER
District Attorney of
Los Angeles County

By

HARRY B. SONDHEIM
Head, Appellate Division

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Deputy District Attorney

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APPENDIX

Pertinent California statutory provisions include:

Penal Code Section 337a provides in part:

> Every person
>
> 1. Who engages in pool selling or bookmaking, with or without writing, at any time or place; or
>
> 2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or enclosure, of any kind, or any part thereof, with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, of any any purported wager or wagers, or of selling pools, or purported pools, upon the result, or purported

result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beat, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

* * * * *

4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, enclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivision 1, 2, 3 or 4 of this section; or

6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus,

is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison.

* * * * *

Penal Code Section 871.5 provides in part:

(a) When an action is dismissed by a magistrate pursuant to Section 859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389, or a portion thereof is dismissed pursuant to those same sections which may not be charged by information under the provisions of Section 739, the prosecutor may make a motion in the superior court within 15 days to compel the magistrate to reinstate the complaint or a portion thereof and to reinstate the custodial status of the defendant under the same terms and conditions as when the defendant last appeared before the magistrate.

(b) Notice of the motion shall be made to the defendant and the magistrate. The only ground for the motion shall be that, as a matter of law, the magistrate erroneously dismissed the action or a portion thereof.

(c) The superior court shall hear and

determine the motion on the basis of the record of the proceedings before the magistrate. If the motion is litigated to decision by the prosecutor, the prosecution is prohibited from refiling the dismissed action, or portion thereof.

* * * * *

(e) When a court has ordered the resumption of proceedings before the magistrate, the magistrate shall resume the proceedings and when so ordered, issue an order of commitment for the reinstated offense or offenses within 10 days the superior court has entered an order to that effect or within 10 days after the remittitur is filed in the superior court. Upon receipt of the remittitur, the superior court shall forward a copy to the magistrate.

* * * * *

(g) * * * * *

If the superior court grants the motion for reinstatement and orders the magistrate to issue an order of commitment, the defendant, in lieu of resumed proceedings before the

magistrate, may elect to waive his or her right to be committed by a magistrate, and consent to the filing of an amended or initial information containing the reinstated charge or charges. After arraignment thereon, he or she may adopt as a motion pursuant to Section 995, the record and proceedings of the motion taken pursuant to this section and the order issued pursuant thereto, and may seek review of the order in the manner prescribed in Section 999a.

Penal Code Section 1238 provides in part:

(a) An appeal may be taken by the people from any of the following:

* * * * *

(7) An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code.

Penal Code Section 1385 provides:

The judge or magistrate may, either of its own motion or upon the application of the

prosecuting attorney, and in furthereance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

Penal Code Section 1538.5 provides in part:

(a) Grounds. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state

constitutional standards.

(b) First hearing. When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Evidence. Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) Effect of granting motion. If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section, Section 871.5, Section 1238, or Section 1466 are utilized by the people.

(e) Return of property. If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section, Section 871.5, or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) Felony; motion upon filing information in superior court or at preliminary hearing in municipal or justice court. If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made in the superior court only upon filing of an information, except that the defendant may make the motion at the preliminary hearing in the municipal or justice court but the motion in the municipal or justice court shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

* * * * *

(i) Felony; renewal of motion at a special hearng; review. If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or

seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

j) Relitigation of question after grant of motion; new evidence; review. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and

the ruling at the prior hearing shall not be binding in any subsequent proceeding. In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 15 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the speical hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special

hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court

provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

* * * * *

(m) Exclusive pre-trial remedy; review on appeal after conviction. The proceedings provided for in this section, Section 871.5, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a

plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Motions on other grounds; existing law and procedure. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (i) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to

Section 871.5 or 995 or the procedures which may be initiated after the granting or denial of such a motion.

* * * * *

Supreme Court, U.S.
FILED
DEC 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1835

In The
Supreme Court of the United States
October Term, 1986

CALIFORNIA,
Petitioner,

vs.

PETER ROONEY,
Respondent.

WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT DIVISION 7

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether there can be reasonable expectation of privacy, for the purposes of the Fourth and Fourteenth Amendments, with respect to garbage placed in a communal trash bin of a multi-unit apartment building.

2. Whether there is an abandonment of property, for purposes of the Fourth and Fourteenth Amendments, when garbage is placed in a communal trash bin of a multi-unit apartment building.

3. Whether the Fourth and Fourteenth Amendments are violated when a police officer searches a communal trash bin of a multi-unit apartment building without a search warrant, probable cause, or consent.

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No. 85-1835

In The

Supreme Court of the United States

October Term, 1986

CALIFORNIA,

Petitioner,

vs.

PETER ROONEY,

Respondent.

WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE SECOND APPELLATE DISTRICT DIVISION 7

BRIEF OF RESPONDENT

To the Honorable William H. Rehnquist, Chief Justice of the United States, and to the Honorable Associate Justices of the United States Supreme Court:

Respondent Peter Rooney, by his counsel, presents his brief in the above entitled matter, urging affirmance of the California Court of Appeals for the Second Appellate District.

OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Seven is reported (as modified) as *People v. Rooney,* 175 Cal.App.3rd 634, 221 Cal. 49 (1985). A copy of this opinion is set forth at pages 72-111 of the Joint Appendix.

—o—

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven was filed on December 13, 1985, and the opinion was modified on December 19, 1985. (JA 72,110.) Timely petitions for rehearing were denied by the Court of Appeal on January 7, 1986. (JA 112.) Timely petitions for review were denied by the California Supreme Court on March 13, 1986. A Petition for Certiorari was filed on May 6, 1986 by the State of California and that Petition was granted on October 14, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

"[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . " U.S. CONST. amend. XIV, § 1.

The pertinent California constitutional provisions include:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." CAL. CONST. art I, § 13.

STATEMENT OF THE CASE

On December 3, 1983, an informant told the affiant on the affidavit in support of the ultimately issued search warrant, Officer Shorb, that respondent, Peter Rooney, was accepting wagers on professional football games over the telephone and with an answering machine at (213) 656-8430. Although the informant told Shorb that respondent was "in the location between 1600 hours and 1800 hours," the informant did not tell Shorb the address of "the location."

On December 7, 1983, Shorb ascertained through the telephone company that the number given to him by the informant was registered to a Peter Ryan at 1120 North Flores Street, Apartment # 8, West Hollywood. Shorb also determined that the utilities at that address were registered in the name of Peter Ryan.

On December 13, 1983, Shorb learned from respondent's arrest record that respondent had been arrested three years earlier for bookmaking activities at 1120 North Flores Street, Apartment # 8, West Hollywood. Shorb obtained a booking photo of respondent from the prior arrest.

On December 15, 1983, Officers Shorb and Wyeth went to 1120 North Flores Street, West Hollywood, a 28 unit apartment building with a subterranean garage. The officers entered the garage and conducted a search of the communal trash bin, which measured approximately 8′x4′x5′, and was filled to capacity. Upon reaching the bottom half of the bin, Shorb discovered a brown paper shopping bag with mail addressed to defendant, but not to Peter Ryan, at 1120 North Flores Street, Apartment # 8 West Hollywood, the address obtained from the telephone company and defendant's arrest record. The bag also contained pieces of paper with "sports wagers, pays and owes, and a tally sheet of wagers on professional football teams . . . ."

Based on this trash bin discovery, a search warrant was obtained for respondent's apartment, respondent was arrested, and charges were brought against him under relevant California bookmaking statutes.

Eventually the trial court granted a motion to suppress evidence on the grounds that, inter alia, police had violated respondent's reasonable expectation of privacy in conducting a warrantless, non-probable cause, non-consensual search of the closed opaque trash bag located deep in respondent's communal trash bin.

———o———

SUMMARY OF ARGUMENT

1. There is a preference for the obtaining of a search warrant when police officers intend to search a particular location, having, as here, a sufficient and necessary nexus to a private abode, for evidence of crime. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022.

2. Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions. *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 515, 19 L.Ed.2d 576. *Coolidge v. New Hampshire,* 403 U.S. 443, 454-455, 91 S.Ct. 2022, 2032; those who seek exemption from this rule must show that an exigency made the warrantless search imperative. *McDonald v. United States,* 335 U.S. 451, 456, 69 S.Ct. 191, 193, 93 L.Ed. 153.

3. If probable cause exists to believe that a garbage container is a repository for evidence of criminal activity, it may be seized under its analogy to the so-called "automobile exception" to the securing of a search warrant, and if reduced to police custody to obviate an exigency, a search warrant must be obtained to search it. *Carroll v. United States,* 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543; *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975; *Coolidge v. New Hampshire,* 403 U.S. 443, 458, 90 S.Ct. 2022, 2033; *People v. Dumas* (1973), 9 Cal.3d 871, 882; *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *Arkansas v. Sanders,* 442 U.S. 752, 99 S.Ct. 2586, 61 L.Ed. 2d 235 (1979); *Robbins v. California* (1981), 453 U.S. 420, 101 S.Ct. 2841, 69 L.Ed.2d 744.

4. No probable cause existed in the case at bar to support that respondent's segregated garbage, deposited in a closed opaque brown paper bag, contained evidence of crime such as to open it after it was seized and reduced to police custody without first securing a search warrant. *People v. Rooney,* 175 Cal. App. 3rd 634, 221 Cal.Rptr. 49 (1985).

5. The Fourth Amendment to the United States Constitution protects people, not places, or areas; what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection; but what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. *Katz v. United States* (1967), 389 U.S. 347, 351-352. In the case at bar, respondent concealed his garbage in a closed, opaque brown paper bag which, when reduced to policy custody, must be opened only via the warrant process. *United States v. Chadwick,* 433 U.S. 1; *Arkansas v. Sanders,* 442 U.S. 753; *Robbins v. California,* 453 U.S. 420.

6. The genesis for the bulk of federal and state garbage can privacy decisions, *Abel v. United States,* 362 U.S. 217 (1960), is distinguishable on its facts; in *Abel,* the defendant left a hotel room via the check out process and thus had not expectation of privacy in either the room or its wastebasket, since he no longer had any connection with either that room or its wastebasket; moveover, *Abel* deposited his items in the wastebasket right under the very eyes of arresting officers, and thus he could hardly have a reasonable expectation of privacy in these items; in the domestic garbage can cases, the homeowner maintains ownership or has standing in his use of the communal trash bin

and has not severed any connection to the trash container/communal bin; thus all federal/state garbage can cases stemming from *Abel v. United States* (1960), 362 U.S. 217 have a faulty foundation/premise and are devoid of analysis.

7. Garbage placed in the domestic garbage cans of America by American citizens is not "abandoned" in the property sense, but is merely placed in the can as a temporary conduit to its ultimate place of destruction/burning/burying in the garbage dumps; the citizens of America recognize that, potentially, professional scavengers, children, and animals may dislodge the garbage but have a reasonable expectation that their garbage will remain private and free from search and rummage by officers of the law acting without warrant, probable cause, or consent. Because of this, there is a reasonable expectation of privacy for the purposes of the Fourth and Fourteenth Amendments with respect to garbage placed in closed garbage cans to comply with whatever the local law provides for the removal of the garbage from the domestic home/curtilage.

8. The Fourth and Fourteenth Amendments are violated when a police officer searches a domestic trash can/communal trash bin without search warrant, probable cause or consent.

9. Garbage placed in garbage cans may be subject to inspection or dislodging by professional, civilian scavengers, children, and animals, but much less probability exists that police will search any given can; the mathematical improbability gives a reasonable expectation of privacy of and in itself.

10. Respondent, being a California citizen, had an already heightened, established, judicially determined reasonable expectation of privacy in his garbage. *People v. Edwards,* 71 Cal.2d 1096, 80 Cal.Rptr. 633, 458 P.2d 713 (1969); *People v. Krivda,* 5 Cal.3rd 357, 95 Cal.Rptr. 62, 468 P.2d 689 (1971). This existing law governed the illegal seizure of his garbage from the communal trash bin in the subterranean garage of his apartment and any change in that law must be non-retroactive as to respondent.

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ARGUMENT I

WHERE POLICE PLAN TO SEARCH AND SEIZE THE CONTENTS OF A DOMESTIC GARBAGE CAN/COMMUNAL TRASH BIN THEY SHOULD SECURE A SEARCH WARRANT; IF EXIGENT CIRCUMSTANCES CAN BE DEMONSTRATED, THEY CAN REDUCE THE GARBAGE CAN TO THEIR CUSTODY AND THEN SECURE A SEARCH WARRANT TO ENTER IT; ABSENT PROBABLE CAUSE TO BELIEVE IT CONTAINS CONTRABAND, WARRANTLESS SEARCHES ARE DISFAVORED.

It is plain that in the case at bar police willfully and premeditatively entered into the subterranean garage of respondent's multi-unit apartment complex and conducted a search of the communal trash bin; this bin was 8'x5'x4' and was filled to capacity with various trash containers/bags deposited by the residents.

Upon reaching the *bottom half* of the 160 cubic foot container, they found a closed opaque brown paper bag identified as belonging to respondent.

The clear goal of the police was to look for evidence of criminal activity, here bookmaking on the part of respondent.

Respondent urges throughout his thesis and this brief that he was entitled to a reasonable expectation of privacy in his trash deposited in a closed, opaque bag in his assigned trash bin, and such authorities of this Court as *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022 requires *police* to obtain a search warrant on such a planned seizure and search for evidence of a crime.

The domestic trash cans of America are so integrally connected to the domestic scene that they should be treated analogous to a home, a garage, or an automobile, or a telephone booth, and if probable cause exists to believe any one of these domestic related appurtenances is a vehicle for crime commission, a search warrant should be obtained to search it, or, given probable cause *and* exigent circumstances, it may be searched on the spot if it could not be reduced to police custody.

In its ruling that a search warrant is necessary for the seizure of *objects* in a *premeditated* entry, seizure, and search, this Court said in *Coolidge v. New Hampshire,* 403 U.S. 443, 484, 91 S.Ct. 2022, 2047:

> "We are convinced that the result reached in this case is correct, and that the principle it reflects—that the police must obtain a warrant when they intend to seize an object outside the scope of a valid search incident to arrest—can be easily understood and applied by courts and law enforcement officers alike. It is a principle that should work to protect the citizen without overburdening the police, and a principle that preserves and protects the guarantees of the Fourth Amendment."

However, it is, of course, true that a garbage can may or may not be as mobile as a vehicle, and thus, analogous to the so-called "automobile exception" to the 4th Amendment it may be searched without a warrant assuming probable cause exists to believe it contains contraband. This would be true of the relatively easily moved personal domestic trash can placed at curbside to await the pickup of the garbage hauler. That can, upon probable cause, could be searched on the spot, or in more compliance with the concept of a closed opaque container reduceable to police custody, seized and thereafter a warrant obtained to enter it. The automobile search rules of *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, and *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, could be and should be, and have been, applied to the garbage can believed to contain contraband. See, for example, *People v. Dumas* (1973), 9 Cal.3d 871, 882 Fn. 9, 884; *People v. Rooney*, 175 Cal.App.3d 634, 221 Cal.Rptr. 49 (1985). Under the reasoning of *United States v. Chadwick*, 433 U.S. 1, *Arkansas v. Sanders*, 442 U.S. 753, and *Robbins v. California*, 453 U.S. 420, where it is believed that a closed opaque trash can, or a given closed opaque trash bag within a communal trash bin offends, and it can be reduced to police custody, the removal of exigent circumstances upon seizure dictates that a search warrant should be secured. In this sense the individual home domestic trash can and the individual trash bag sought in and seized from the communal trash bin are like the trunk shipped via rail to Boston and are unlike the "automobile exception", as is made clear by the Chadwick-Sanders-Robbins trilogy.

Plainly, under the facts of this case, no exigent circumstances prevailed which would circumvent the general rule of *Coolidge v. New Hampshire*, 403 U.S. 443; as early as December 3, 1983, some 12 days prior to the warrantless, non-consensual search of the communal trash bin, police had information concerning respondent's alleged bookmaking activities, and knew of his telephone number. These facts would have allowed them to attempt to place bets via telephone, and if they were successful, seek a search warrant to search the trash bin on the usual theory that police advance, namely, that experienced police officers, "familiar with bookmakers habits, believe that they dispose of betting paraphernalia in their trash," etc.

But, intending to seize and search in the trash bin, the warrant process was circumvented, in defiance of the Coolidge mandate, by the police. Indeed, after reducing respondent's trash to their custody, the police still did not comply with such additional mandates governing the search of closed opaque containers believed, of and in themselves, to offend against the law, set forth by this Court in Chadwick-Sanders-Robbins.

Of and in itself this constitutes a violation of respondent's rights to a reasonable expectation of privacy under the 4th and 14th Amendments.

ARGUMENT II

BASED ON ANALYTIC IN-DEPTH LOGIC, THERE IS A REASONABLE EXPECTATION OF PRIVACY IN A DOMESTIC GARBAGE CAN OR COMMUNAL TRASH BIN; THE EXISTING LAW OF CALIFORNIA, VIABLE FOR OVER 15 YEARS, GAVE RESPONDENT A JUDICIALLY INSURED REASONABLE EXPECTATION OF PRIVACY, DISALLOWING WARRANTLESS, NON-PROBABLE CAUSE, NON-CONSENSUAL SEARCHES OF CALIFORNIA GARBAGE CANS.

As an extension of either the *person* or the *home,* the domestic garbage can and communal trash bin are intregal parts of the domestic scene. It is surely one of the *effects* of the *person* and *home* since it is clearly a necessary and salient element of the carrying on of life itself.

No one quarrels with the proposition that the domestic garage is an extension of the *home* and is therefore entitled to 4th Amendment protection. Indeed, while a domestic garage could arguably be dispensed with, the car housed outside in the weather, it is likely less easy to make an argument that the garbage can, bag, receptacle, or whatever, could be similarly done away with, for then the citizens would be hard pressed to carry on the combustion of life itself. As such, the domestic garbage can is an indispensible and integral extension of both the *person* and the *home* and is itself an *effect* often containing *papers* that, while abandoned in the personal property sense, are not abandoned in the *reasonable expectation of privacy sense* as we analyze below. In preparation for that analysis, we note with careful interest that the cases

upholding the warrantless, non-probable cause, non-consensual seizure and search of the domestic garbage cans (notably the multitude of U.S. Circuit Courts) of this nation do so with *zero* to little analysis, but simply, and tersely, state that "abandoned property" is entitled to no reasonable expectation of privacy. We echo one probative dissenting state judge (*People v. Huddleston,* 38 Ill. App.3d 277, 347 N.E.2d 76, 81, Justice Stouder) that the "results in the cases relied upon by the majority support the majority opinion (but) these cases *have internal weaknesses and are not sufficiently persuasive.*"

Of course they are not "sufficiently persuasive" for they are totally *conclusionary,* unsupported by any considered *analysis.* In contrast, such leading cases as *People v. Edwards,* 71 Cal.2d 1096 and *People v. Krivda,* 5 Cal. 3rd 357, and studied dissents in the cases of terse and shallow majority opinions upholding warrantless seizures, present in depth analysis in support of a reasonable expectation of privacy in the domestic garbage can.

In fact, one broad introductory comment must be made: it is the *garbage can,* or the *communal trash bin,* which is the arm of the *person,* the *home* and the *effect* that is to *be accorded protection;* the *contents* achieve their protection derivatively by virtue of being *within* the key protected garbage can. Naturally, if one spews his refuse out in the open for all to see without required rummaging or searching, we do not illogically assert a reasonable expectation of privacy in that limited circumstance.

This Court declared in *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) that the "Fourth Amendment protects people, not places." Under

the proper interpretation of *Oliver v. United States,* 466 U.S. 170, 176, in considering the scope of the Fourth Amendment as to the protection afforded to "persons, houses, papers and effects," it is clear that the domestic garbage can/communal trash bin is a necessary and actual extension of the *person* and the *house,* and is itself a necessary *effect* which may and does contain *papers* of the owner of that can, or the user of the communal bin, so as to afford protection under the 4th and 14th Amendments.

Thus the fact that respondent's trash bin was located in the subterranean common garage is not the focus; the proper perspective remains on the common bin itself, not its fortuitous location. It is the *bin* which is linked to the *person,* the *house,* and is the 4th Amendment *effect.* Thus, under the protection under *Katz* to the person, it is the garbage can/bin which is to be protected, not its location.

Justice John Marshall Harlan, in a concurring opinion, expressed a two-fold requirement that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." (389 U.S. 347, 361).

In the case at bar, respondent did all that he needed to do under the law of California now extant: he placed his trash in a closed, opaque bag and deposited it in a trash bin judicially determined to be immune from warrantless, non-probable cause, non-consensual search. We argue that society is prepared to recognize garbage can privacy under a manifold of facts known about the manner of garbage collection, the habits of professional/amateur

scavengers, children and animals, the inability of police to meaningfully use garbage can searches as a crime combative tool in a random manner, and finally under a general broad overall canopy that few, if any citizens, welcome police scrutiny of their *effects* and *papers,* including love letters, bank deposit information, contraceptives, tampons, restricted reading materials, and other tell-tale items on the road map of life in the previous week.

It is too akin to telephone tapping and clandestine visual surveillance into private areas of life to find sanction by this Honorable Court without the interposition of a neutral magistrate in the search warrant process.

Thus, the citizens of the United States, and surely those in California, have a reasonable expectation of privacy in their domestic garbage cans/communal trash bins as to warrantless, non-probable cause, non-consensual seizures and searches by police. This is based on well-recognized, or logical reasons and the law of California concerning the search of California garbage cans existing since 1969 in *People v. Edwards,* 71 Cal.2d 1096, 80 Cal. Rptr. 633, 458 P.2d 713 (1969), extended by *People v. Krivda,* 5 Cal.3rd 357, 95 Cal.Rptr. 62, 468 P.2d 689 (1971).

A. The realities of, and knowledge of the citizens concerning, how domestic garbage is collected.

One need go no further, to be convinced that the likelihood of garbage haulers themselves seizing and searching domestic garbage cans is small to non-existant, than to observe the domestic garbage collection process in actual operation.

In any domestic neighborhood, it is usually done by at lea t two men operating huge, covered trucks. As one

man drives, the other hops off the truck, grabs the can or cans, upends each into the well of the truck, and upon the actuation of an elevating mechanism button, the garbage is elevated into the common huge receptacle of the truck. The truck quickly moves on to the next location, and the process is repeated, and so on through the neighborhood. There is simply *insufficient to zero* time for professional garbage haulers to rummage in each can to look for such "valuable" items as spent soft-drink/beer aluminum cans, items of clothing, broken but repairable appliances and other jettisoned matters. We further suspect that professional garbage haulers would not even recognize "pay-owe" sheets, pari-mutuel betting slips, or "drug residue" so as to have revealed to them possible *criminal activity* of our citizens. Thus the *likelihood* of non-police personnel, such as professional garbage haulers, discovering contraband in the small percent of cans which might contain it on a given pick-up day must be miniscule. It is this mathematically small probability that, of and in itself, must dictate a reasonable expectation of privacy in our domestic garbage cans. The average homeowner in America believes that his refuse will be quickly removed from his can, elevated into a truck to join other garbage therein and become intermixed in such an indistinguishable manner as to defy further identification; it will be hauled to the dump, where it will be burned/destroyed/plowed under by Caterpillar tractors, to form the foundation for new housing developments. These beliefs are, of course, well founded because these beliefs are the realities of garbage collectors.

Mathematically, then, the sheer probability of garbage examination by the professional haulers is so

small as to be virtually molecular/atomic in magnitude, and thus a reasonable expectation of privacy at this stage is virtually certain.

B. The professional and amateur scavenger, the child, and the animal.

It is contended by some, including *amicus curiae* Americans for Effective Law Enforcement, that the always potential presence and activities of professional and amateur trash can scavengers diminishes, if not totally abrogates, a reasonable expectation of privacy in domestic garbage cans/communal trash bins.

Of course, it is acknowledged that such persons often make their living by rummaging among the jettisoned items, from a home, deposited in a trash can. Thus the economic gains derived from recycling of aluminum beer and soft drink cans is said to attract scavengers to the trash can, destroying privacy.

The obvious answer to this is that these scavengers look into *every* trash can on the street for readily discernible items such as the aluminum cans, or items of clothing, or repairable appliances, and upon finding these items, take them and depart. They do not play the role of government, police, and law enforcement carrying out clandestine and surreptitious surveillance, search and seizure for evidence of crime. Indeed, these scavengers, likely would not even recognize indicia of crime interposed with the aluminum cans, such as "pay-owe" sheets, pari-mutuel slips, or slight marijuana residue, and hence constitute a far different problem than the clandestine garbage can search by police. The other obvious answer is that the 4th

Amendment was never designed to protect the citizen against search/seizure encroachments by their fellow citizens; it was designed to insulate against *government* acts which violate a reasonable expectation of privacy.

At least one learned jurist has recognized in an extensively analyzed dissent this readily discernible major difference between the *scavenger* and the professional policemen, i.e., a "differential expectation of privacy."

In *Smith v. State* (1973) Alaska, 510 P.2d 793, 803, Chief Justice Rabinowitz stated:

> "Without elaborating, the court rejects as being 'too attenuated' appellant's theory of 'differential expectations of privacy' and in so doing fails to recognize that citizens might expect a few, infrequent invasions of their privacy by third persons, but might simultaneously expect their privacy to remain immune from governmental intrusion. I disagree. *A telephone caller, for example, who conducts a conversation on a 'party line' might reasonably expect brief interruptions from others who were attempting to ascertain if the line were in use. It does not necessarily follow, however, that the same caller would also expect that government agents might be conducting a full-scale warrantless 'search' or tap of his conversations. Similarly, one who deposits refuse into a dumpster might expect some minor, inadvertent examination by garbagemen or other third persons, but such expectations would not necessarily include a detained, systematized inspection of the garbage by law enforcement personnel.* As the California Supreme Court correctly observed in *Krivda:*
>
> "Of course, one must reasonably anticipate that under certain circumstances third persons may invade his privacy to some extent. It is certainly not unforeseen that trash collectors or even vagrants or children

may rummage through one's trash barrels and remove some of its contents. However, as stated in *People v. McGrew*, 1 Cal.3d 404, 412, 82 Cal.Rptr. 473, 478, 462 P.2d 1, 6, 'The hotel guest may reasonably expect a maid to enter his room to clean up, but absent unusual circumstances he should not be held to expect that a hotel clerk will lead the police on a search of his room.' " (5 Cal.3rd 357, 364)

Similarly, in dissent in *State v. Schultz*, Fla.App., 388 So.2d 1326, 1330-1331, Florida Appellate Judge Anstead enunciated:

"In my view, a homeowner, upon placing items in a closed garbage container and placing the container in a position on his property where the container can be conveniently removed by authorized trash collectors, is entitled to reasonably expect that the container and the trash therein will be removed from his property only by those authorized to do so, and that such trash will be disposed of in the manner provided by ordinance or private contract. By sealing the containers in a secure manner and placing the containers on his own property, the owner has done everything within his own means to insure the privacy of the contents thereof, shore of delivering the containers to a central disposal site himself.

"While it is true that one cannot reasonably expect trash containers to be completely safe from the probing of dogs, curious children, the trash collectors themselves, and possibly others, common sense tells us that one should be able to expect that his property and trash containers will be free from search and seizure by the police, neighbors and others who are and should be more knowledgeable and respectful of the property and privacy rights of others. The fact that dogs, or others, may occasionally and wrongfully trespass upon private property and go through one's 'private' trash

> does not justify others in doing so. We should still be mindful of the adage that two wrongs do not make a right. Moreover, we are simply not involved here with the accidental disclosure of contraband because of the activities of dogs, children, or trash collectors."

Of course, *children* rummaging in the trash would be even less likely than adult scavengers to look for evidence of crime, or recognize it if they saw it, and of course hungry *animals* would have zero ability to look for, or discern, criminal activity. It is the police officer, under the 4th Amendment protection afforded every citizen, that is of severe concern to the concept of reasonable expectation of privacy; the meaningful judicial analyzer can readily dismiss the issue of the scavenger, the child, and the animal as being potential encroachers upon the citizen's right to be let alone and free of government invasion of his privacy expectations, and thus reject the specious argument that one should *not* reasonably expect to have privacy from police if one does not from the scavenger, a child, or an animal.

C. The non-probable cause search of garbage cans by police.

Again, mathematical probability dictates a reasonable expectation of privacy in domestic garbage cans by police acting without probable cause to believe a given can contains contraband.

A city such as Los Angeles contains, say, 5 million people, and employs, say 10,000 policemen. Obviously the great bulk of these police are employed in combatting known criminals who are engaging in known criminal activities. This means that extremely few law enforcement

personnel could be used in non-probable cause garbage can searches in a random manner. Assuming even 100 police could be used to search the some million garbage can of a metropolitan area, it follows that the ratio would be a mere 100 police/1,000,000 cans or 1 officer per 10,000 cans, a demonstrably impossible task. When one recognizes that likely relatively few cans, on a given date, contain evidence of crime, it is plain that the local chief of police will not opt for a routine garbage can search detail, burdening his apparently thin force with such unproductive activity.

Of course, if *probable cause* does exist to search a given can, that is a different matter, and calls for the search warrant process.

This mathematical analysis speaks logically and loudly for a belief by the citizenry that there does in fact exist a reasonable expectation of privacy in the domestic garbage cans of America.

D. The logical desire and expectation of the United States citizen as to his garbage contents privacy.

It goes without saying that the contents of one's domestic garbage can is a road map of many factors of his or her life. Everything from contraceptives, used tampons, liquor bottles, pornographic magazines, love letters, medicine bottles, bank deposit information, demands for unpaid bills, and food residue, can and does occupy the typical garbage can. Some even, albeit few, contain marijuana residue and other indicia of crime.

The California Supreme Court, in its well-reasoned cases now constituting the law of warrantless garbage can searches said:

> ". . . We can readily ascribe many reasons why residents would not want their cast-away clothing, letters, medicine bottles, or other telltale refuse and trash to be examined by neighbors or others, at least not until the trash has lost its identity and meaning by becoming part of a large conglomeration of trash elsewhere. Half-truths leading to rumor and gossip may readily flow from an attempt to 'read' the contents of another's trash." *People v. Edwards,* 71 Cal.2d 1096, 1104, 80 Cal.Rptr. 633, 458 P.2d 713; *People v. Krivda,* 5 Cal.3d 357, 366, 96 Cal.Rptr. 62, 486 P.2d 1262.

We can perceive little to zero reason why *any* California citizen, or of any state, would wish to embrace police/law enforcement/government routinely searching his trash can, thus revealing to government his intimate and private life. Surely following the advent of *Bowers v. Hardwick,* — U.S. —, 54 L.W. 4919, our friends of perhaps different sexual preference would not desire the residue of their activities, deposited in their garbage cans, to fall into the hands of law enforcement. The Roman Catholic Church still takes a stand against the use of contraceptives for birth control; our nation's many million Catholics who may transgress this element of the church would find little solace in the knowledge that tell-tale contraceptives would show up in their garbage. Cf. *Griswold v. Connecticut,* 381 U.S. 479. In a like vein, although approved by this Court in *Stanley v. Georgia,* 394 U.S. 357, the showing of home pornographic movies is not approved by all in our society; evidence thereof appearing in the domestic garbage may give concern to a good many of our populace.

It is of significant interest that cases upholding a reasonable expectation of privacy in domestic garbage cans do so with excellent, well-reasoned, logical, in depth analy-

sis, while those who deny such reasonable expectation of privacy do so with little to no analysis. See in addition to *People v. Edwards,* 71 Cal.2d 1096 and *People v. Krivda,* 5 Cal.3d 357, the following: *People v. Huddleston,* 347 N.E. 2d 76, 81-86, Stouder, Justice, dissenting; (Justice Stouder accuses these cases of "having internal weaknesses and not sufficiently persuasive;" Federal Circuit cases are marked with an absence of any real analysis save merely quoting each other by citation.) *Smith v. State of Alaska,* 510 P.2d 793, 799-805, Rabinowitz, Chief Justice dissenting; compare, and in accord with *Edwards* and *Krivda, Everhart v. State,* 274 Md. 459, 337 A.2d 100, 114-116; *Ball v. State of Wisconsin,* 57 Wis.2d 653, 205 N.W. 2d 353.

In *State v. Chapman,* Maine, 250 A.2d 203, 212, the Supreme Judicial Court of Maine noted that a bottle deposited in a trash barrel, still in the garbage, well down in the barrel and covered with trash and paper, exactly as in the instant case, strongly suggested that it was intentionally hidden and concealed, and thus a reasonable expectation of privacy appertained. *Abel v. United States* (1960) 362 U.S. 217, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 was distinguished, where, in *Abel,* it was clear that the defendant abandoned his hotel room and the wastebasket therein in which he had deposited evidentiary items right before the eyes of the police just before his final departure.

In *Bolen v. State,* 544 S.W.2d 918, the Tennessee Court of Criminal Appeals accorded reasonable expectation of privacy in a large trash dumpster located on the defendant's property absent a showing on the part of the prosecution that the defendant had the mental state of abandonment.

In *State of Arizona v. Broom,* 113 Ariz. 495, 557 P.2d 1052 the Supreme Court of Arizona accorded privacy to a small bag placed behind trash cans, but not within them. There was no showing that defendant had "abandoned" the brown paper bag nor had he "knowingly exposed it". See also, for privacy expectation, *Fixel v. Wainwright,* 492 F.2d 480, 483-484 (5th Cir. 1974) (trash container in fenced backyard of apartment building).

The great majority of Federal Circuit Court cases tersely deny an expectation of privacy in trash receptacles in a nonanalytical single sentence, i.e. that "abandoned" property is not entitled to any "reasonable expectation of privacy." Yet these cases never really tell us why one should not expect privacy in the trash, and the instant petitioner's brief is likewise devoid of virginal and analytical supportive explanation. Surely the issue is most simplistic and facile to these laconic Federal and State Courts and the advocates who have successfully urged their unsupported conclusions of "abandonment" equalling no reasonable expectation of privacy.

Following the holdings of such cases as *Work v. United States,* 100 U.S. App. D.C. 237, 243 F.2d 660 (1957), the law of garbage can searches in the United States Circuit Courts is bottomed on cases lacking in depth *analysis* as to *reasonable expectation of privacy.* Commencing with germinal cases stemming from *Abel v. United States,* 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668, each succeeding circuit case embraces its predecessor, or conglomerate predecessors, to conclude that trash is "abandoned" and therefore not subject to a *reasonable expectation of privacy. Abel,* however, must be distinguished because there the

defendant placed the seized items in the wastebasket right under the eyes of the arresting police, and thus it is difficult, if not impossible, to suggest that *Abel* had any reasonable expectation of privacy; moreover, *Abel* preceded the case of *Katz v. United States*, 389 U.S. 347, and therefore must not be read to countermand *Katz's* subsequently developed reasonable expectation of privacy criteria.

One of the first of such cases concluded, in 1962, that a communal trash bin was "outside the curtilage" and that trash was "abandoned", however, without reference to *Abel*. The 3rd Circuit concluded that because of the non-individual control of the trash receptacle, the victim of the garbage seizure had an "insubstantial interest" in the communal bin. In *United States v. Minker*, 312 F.2d 632 (3rd Cir. 1962), a wagering case, the defendant was suspected of running a gambling operation in Reading, Pennsylvania. Various "raids" conducted by the government on several of defendant's locations failed to turn up any evidence linking the defendant to the operation, although adding machines, numbers slips, tally sheets, and other indicia of the profession were uncovered. Eventually government agents arranged with one Damore, a trash collector, to permit them to examine the contents of a trash receptacle located on the premises of the defendant's apartment building used by four tenants and the building superintendent. This step was more fruitful, for "handwriting identified as Minker's" appeared on some of the seized papers, which were leisurely examined off the situs by the agents. The 3rd Circuit held that Minker had "abandoned" this property, although acknowledging that "abandonment was largely a question of intent . . . and

intent, in turn, is a question of fact . . ." The opinion did not disclose whether the paper was lying in plain view within the communal bin, or was in repose within a closed, opaque bag in the bin.

The aftermath of *Abel* surfaced in a 1971 Second Circuit case. In *United States v. Dzialak,* 441 F.2d 212 (2d Cir. 1971), company security investigators believed the defendant, a Railway Express employee, was pilfering articles entrusted to him for delivery, and set up a surveillance of his home; agents seized a closed, opaque cardboard box which was part of trash left between the sidewalk and street in front of the home; a second "trash" seizure occurred a week later. Each revealed incriminating evidence of articles shipped by Railway Express and apparently being diverted to the defendant's personal gain. While noting that local municipal ordinances precluded such rummaging into trash, the Second Circuit asserted that it was not "persuaded", because it was, to them, "abundantly clear that Dzialak *abandoned* the property", relying on *Abel v. United States,* 362 U.S. 217, 241, 80 S.Ct. 683, 698, 4 L.Ed.2d 668 (1960).

Of course, like many of the Federal Circuit cases, the seizure of the closed, opaque, cardboard box, and its reduction to police custody, with no inquiry whether a search warrant should be sought, preceded the analysis of *United States v. Chadwick,* 433 U.S. 1 and *Arkansas v. Sanders,* 442 U.S. 753.

The U.S. First Circuit then embraced, without analysis, the *Dzialak* and *Minker* rationale, finding "abandonment" had obliterated any reasonable expectation of privacy. In *United States v. Mustone,* 469 F.2d 970 (1st Cir.

1972), as early as March 3, 1971, U.S. Secret Service agents believed that the defendants were printing counterfeit money at a location in Lynn, Massachusetts, since they heard "the sound of an offset press in operation" while conducting a surveillance of the premises. Six days later, without securing a search warrant, surveilling U.S. Secret Service officers watched one defendant carrying two large "tied closed" opaque trash bags, and saw them placed on the sidewalk near some garbage cans "several doors away" from their place of operation. The agent seized the bags and took them to the Boston Secret Service office where they were leisurely opened the next day, and agents found impressions of three and one half counterfeit ten dollar notes and three aluminum offset plates stained with green ink. While *People v. Krivda,* 5 Cal.3d 357, was noted, the First Circuit held ". . . we are not persuaded by this authority, however, and hold that when Brennan deposited the bags on the sidewalk he *abandoned* them . . . Implicit in the concept of *abandonment* is a renunciation of any reasonable expectation of privacy in the property abandoned . . . The contrary suggestion strikes us as anomalous . . ." (469 F.2d at 927).

This 1972 case, of course, preceded the "closed opaque container, reduced to police custody, requiring a search warrant to enter it" reasoning of *United States v. Chadwick,* 433 U.S. 1 and *Arkansas v. Sanders,* 442 U.S. 753.

The U.S. 6th Circuit followed suit in 1976, basing its terse "abandonment equals no reasonable expectation of privacy" ruling on *United States v. Mustone,* 469 F.2d 970 (1st Cir. 1972); *United States v. Dzialak,* 441 F.2d 212 (2d Cir. 1971), and *United States v. Minker,* 312 F.2d 632

(3rd Cir. 1962). In *Magda v. Benson,* 536 F.2d 111 (6th Cir. 1976), the defendant was suspected of United States post office burglary; surveillance of his home noted the defendant placing his apparently closed, opaque garbage bag on the "tree lawn" next to the street adjacent to his residence. The surveilling postal inspector later retrieved the bag and opened it without a warrant, although its reduction to the postal inspector's custody obviated any contention of "exigency", and allowed the leisurely securing of a warrant pursuant to *United States v. Chadwick,* 433 U.S. 1 and *Arkansas v. Sanders,* 442 U.S. 753. The District Judge had ruled that *People v. Krivda,* 5 Cal.3rd 357, and its "interpretation of the U.S. Constitution by a California Court is not binding on this Court", and that "no legitimate expectation of privacy exists as to *abandoned* property". The Sixth Circuit Agreed.

The U.S. 7th Circuit embraced "abandonment" in 1978 although giving some space in its opinion to consideration whether a person placing garbage in a trash can could expect it to remain free of disturbance; that Circuit concluded that the defendant "knowingly risked exposure to the public" by placing anything in his trash barrel. In *United States v. Shelby,* 573 F.2d 971, 973 (7th Cir. 1978) the F.B.I. requested the Milwaukee, Wisconsin garbage collectors to turn over closed, opaque bags taken from defendant's garbage cans from behind his home to enable the F.B.I. agents to search these bags for coin wrappers which would evidence that the defendant had been returning to banks for which he had once been the janitor, via a retained key, and there had pilfered coins. The Seventh Circuit first ruled that the defendant had *standing* to ob-

ject to the seizure of his garbage bags under the Fourth Amendment (573 F.2d at 973), but ruled that the concept of "abandonment" made any purported reasonable expectation of privacy a "bad judgment" on the part of the defendant. Here it would appear that no exigent circumstances foreclosed securing a search warrant for the closed, opaque bags, once they were seized, within the reasoning of *United States v. Chadwick,* 433 U.S. 1 and *Arkansas v. Sanders,* 442 U.S. 753, as F.B.I. agents had previously received information that the defendant was bringing substantial quantities of coins into local banks and depositing them.

All of the foregoing cases were tersely cited to support the "abandonment" theory.

The 4th Circuit's contribution occurred in 1978, again relying on all of the above circuit court decisions, and concluding that the act of placing the trash for collection is an act of "abandonment", and thus the 4th Amendment does not apply. *United States v. Crowell,* 586 F.2d 1020, 1024-1025 (4th Cir. 1978) (police directed private contract trash collectors to turn over trash which had been collected from within defendant's *residence;* trash collectors "had no permission" to do this; the Court observed: "While most people probably expect that their garbage will *not* be inspected but rather will be taken to the dump, it is equally true that most people have no clear understanding of what happens to their garbage when it is removed from their premises and have even less expectation of having anything further to do with it once it is removed. *The real question is whether there is a reasonable expectation of privacy that one's garbage will not be searched.*" 586 F.2d

at 1025). Nonetheless, this Fourth Circuit Panel held that "*abandonment*" as a personal property concept foreclosed any further thoughtful analysis, without answering whether the defendant had reasonable belief that police would not be clandestinely contacting his private service garbage man to enlist his cooperation to effect a search of his closed opaque trash bag. In *Crowell*, supra, apparently police surveillance over a period of time led to the conclusion that a PCP synthesis laboratory was operating on the premises, thus foreclosing any contention that exigent circumstances existed to circumvent securing a search warrant for the home and its then internal garbage bag. The warrantless search of the closed opaque trash bag, once reduced to police custody, would seem to violate the reasoning of *United States v. Chadwick*, 433 U.S. 1.

In 1979, the 5th Circuit joined the "abandonment" theory in *United States v. Vahalik*, 606 F.2d 99 (5th Cir. 1979). *Vahalik* illustrates how the "analysis" becomes shorter to nonexistant as the 5th Circuit Court embraces each preceeding Circuit Court.

> ". . . We prefer the view adopted by every United States Court of Appeals to consider the issue, that the act of placing garbage for collection is an act of abandonment which terminates any fourth amendment protection . . ." (606 F.2d 99, 101).

In *United States v. Reicherter*, 647 F.2d 397 (3rd Cir. 1981), the Court mentioned the "reasonable expectation of privacy" principles of *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), but once again ruled "trash placed in its can" to be "abandoned" in the personal property sense and thus not entitled to constitutional protection. By now the reciting of the cases took

much more space than the area needed to assert the single sentence holding "abandonment equals no reasonable expectations of privacy." (See 647 F.2d 397, 399).

The U.S. 8th Circuit case *United States v. Biondich*, 652 F.2d 743 (8th Cir. 1981) *did not* totally rubber-stamp the long line of predecessors, holding that *only when the trash was fully removed* by the garbage haulers did the reasonable expectation of privacy vanish; in Biondich, the commercial haulers in fact, as in *People v. Krivda*, 3 Cal. 3rd 357, had removed the garbage from the premises, and had *thereafter* cooperated with police in allowing a search one block away in a parking lot; hence Biondich's previously existing reasonable expectation of privacy had evaporated by the act of removal of the garbage by the private garbage hauling service. See also *United States v. Sumpter*, 669 F.2d 1215, 1220-1221 (8th Cir. 1982), reaffirming the somewhat unique 8th Circuit concession to the rationale of *Katz v. United States*, 389 U.S. 347, that privacy remains viable *until* the refuse is liberated from the can by non-police garbage haulers.

United States v. Terry, 702 F.2d 299, 308-309 (2d Cir. 1983) returned to the usual norm of the Federal Circuit Courts—long citations of their own cases absent any assertion save that the trash constituted "abandoned" property. Every conceivable Circuit case emanating from the *Abel* decision of 1960 was cited.

In *United States v. Kahan*, 350 F.Supp. 784 (D.C.S.D. N.Y. 1972), a much more thoughtful and scholarly analysis surfaced, rather than a resort to the facile and shallow "abandonment" route. There a government employee was suspected of criminal activity and his personal waste-

basket, cached beneath his desk, was steadily and daily searched for whatever could be found to substantiate generation of federal criminal charges. The Court initially held that there were, indeed, searches, which the Fourth Amendment recognized, occurring, and nothing could support exigent circumstances to obviate getting a warrant, since they were done repetitively. (350 F.Supp. at 781, paragraph (5)).

Secondly, the Court held that Kahan's supervisor could not consent to the search of Kahan's wastebasket (350 F.Supp. at 793, 794), since Kahan had exclusive and personal use of the waste basket (cf. *United States v. Blok*, 188 F.2d 1019, 88 U.S. App.D.C. 326 (D.C. Cir. 1951) where supervisor could not consent to search of government employee's desk).

The third issue was, and is, the omnipresent and ubiquitous "cop-out" of *abandonment* of anything deposited in the waste basket from the law of personal property.

The district judge, with uncommon erudition on the concept of "abandonment", characterized the issue thusly:

> ". . . the question is not whether there has been abondonment in the property law sense compare *Jones v. United States*, 362 U.S. 251, 265-267, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960) with *Katz*, supra, 389 U.S. at 351-352, 88 S.Ct. 507, *but rather whether there has been abandonment of a reasonable expectation of privacy as to the area searched or the property seized* . . ." (350 F.Supp. 784 at 795).

The Court then proceeds to the nub of the entire garbage can search problem:

> "From this perspective, the flaw in the government's argument becomes immediately apparent. When Mr. Kahan threw papers in his wastebasket, he did "abandon" them *in the sense that he demonstrated an unequivocal intention to part with them forever.* However, *the undisputable expectation of an employee who discards items in his own wastebasket is that they subsequently will be disposed of and destroyed without prior inspection by others.* In this respect, a wastebasket serves a similar function as the mails—a wastebasket is a vehicle for destroying objects; a mailed package is a vehicle for sending them to someone else. In each case, the objects leave the possession of the person, *but his expectation that the vehicle in which they have been placed will be free from unreasonable governmental searches remains the same . . .*"

It has, of course, been held by this Honorable Court that a person does not give up his expectation of privacy with respect to letters and sealed packages when he deposits them in the mail. *United States v. Van Leeuwen,* 397 U.S. 249, 251-252, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970).

The Court noted, again with uncommon prescience, that

> ". . . there is and can be no claim that Mr. Kahan's *wastebasket* was abandoned by him when he left his office in the evening after work. So long as he remained an employee with an assigned desk under which lay a wastebasket for his exclusive use, whether he was actually in the office at any particular time could not possibly affect his expectation of privacy with respect to that receptacle . . ." (350 F.Supp. at 797).

Thus, by analogy, the only vessel possible for disposal of Mr. Rooney's trash, the apartment house dumpster, is not "abandoned" by Rooney nor any other user,

and the concept of personal property "abandonment" totally misses the significant correct issue:

> "Does the depositor of trash give up, or abandon, his reasonable belief that the trash he places within the non-abandoned trash bin or container will not be scrutinized by police, or others at police direction, and does he still have the *reasonable expectation of privacy* in the ultimate fate of the trash, albeit the trash is abandoned in the personal property sense?" (emphasis added)

Since Peter Rooney is, and was, an assigned user of the common *dumpster* for the apartment complex, he obviously has *standing* to object to its warrantless search.

> The *Kahan* judge notes that, as we do, "Where the government believes that criminal prosecution of an employee is warranted, presumably it will have *probable cause* to believe that the employee has committed, or is committing a crime. In that case, if it has probable cause to conduct a Fourth Amendment search or seizure to obtain evidence of crime, *it can follow the warrant procedure . . .*" (emphasis added) (350 F. Supp. at 798).

Thus *Kahan* presents an uncommonly searching and scholarly analysis of the *true* issue of garbage can searches:

It is not the abandonment of the *trash* in the personal property sense that is at issue; indeed, the true issue is what does the American citizen reasonable believe will be the true fate of his trash, *which he has abandoned in the personal property sense, but not in the reasonable expectation of privacy sense?*

The distinction is, of course, the turning point and the key to erudite and correct analysis, and *scholarly decision,* as opposed to a facile, truncated, circumvented and shallow analysis, and *wrong decision.*

Virtually all cases which approve garbage can searches do so on the non-analytical launch-pad, and point of take-off, and route to cloudy thinking, that there is no "reasonable expectation of privacy" in "abandoned" personal property.

Such a path, urged by the State of California, sorely points out the dichotomy necessary for proper perspective of the "garbage can" search issue of the United States Constitution's Fourth Amendment.

Similar terse state cases are available which hold that "abandoned" property in the trash can carries no reasonable expectation of privacy. See, e.g. *People v. Huddleston,* 38 Ill.App.3rd 277, 347 N.E.2d 76 (1976); but see the scholarly and in depth dissent by Justice Stouder at 347 N.E.2d 76, 81 ff; *Smith v. State,* Alaska, 510 P.2d 793; but see Chief Justice Rabinowitz's detailed in depth dissent at 799 ff; *State v. Schultz,* Fla.App., 388 So.2d 1326; but see scholarly dissent by Judge Anstead at 1329ff.

The conclusion is inescapable that the adherents of no reasonable expectation of privacy in domestic garbage cans do so on the simplistic but non-analytical view that the contents are "abandoned" personal property and then follow with the conclusion that as a consequence no reasonable expectation of property is extant. On the other hand, thoughtful and logical analysis, coupled with desires of the citizens of this freedom loving nation, suggests a reasonable expectation of privacy in these arms of the domestic scene.

E. The equal protection of the law to all citizens regardless of whether they live in a multi-unit apartment house complex, or a single unit domestic home, and independent of the local means that garbage is removed by local custom.

Some cases seem to distinguish between expected privacy in an *individually owned* single depository trash can and the unit at bar, the communal trash bin; other cases seem to distinguish between the homeowner bringing the garbage can from his private land onto a public curb for collection purposes vis-a-vis the can remaining on the property when it was seized and searched. Some cases note trash "bags" being seized and searched as opposed to the more formal garbage can. We suggest these differences are more an exultation of form over substance, and not the true touchstone of the necessary issue whether the equal protection of the law should or should not enshroud all homeowners, not leaving to the fortuity of varied living conditions to determine whether the homeowner might reasonably expect that his trash container would be the subject of warrantless, non-probable cause, non-consensual seizure and search by police.

A matrix of representative Federal and State garbage can cases showing a wide variety of physical garbage can/bin variations, locations, and police-garbage collector interaction next follows; all in general, tersely and erroneously, uphold the seizure and search of the *receptacle* irrespective of its shape or size and independent of its location, on the simplistic "abandonment" of contents theory, i.e., the *contents* are "abandoned" and thus, the *contents* are anomalously not to have a reasonable expectation of privacy. As argued, this simplistic approach is erroneous, for the *container,* as a necessary arm of the *person,* the *home,* and as an *effect,* is entitled to 4th Amendment protection, and the contents while within the closed opaque container, are, at that time, engulfed with the 4th Amendment protection of the closed opaque container.

REPRESENTATIVE GARBAGE CAN CASES

U.S. CIRCUIT COURTS

CASE	SITUS OF GARBAGE CAN WHEN SEIZED	SEIZED BY	RATIONALE FOR DECISION
United States v. Minker, 312 F.2d 632 (3rd Cir. 1962)	Communal trash bin located outside multi-unit apartment	Garbage hauler at direction of govt. agents; investigation of gambling	Outside "Curtilage" of dwelling; abandoned property within the can.
United States v. Dzialak, 441 F.2d 212 (2nd Cir. 1971)	Cardboard boxes located between sidewalk and street in front of home	Railway Express Agent, thus not governmental action; investigation of thefts from Railway Express	Abandoned property in the box and the box itself; *Abel v. United States*, 362 U.S. 217
United States v. Mustone, 469 F.2d 970 (1st Cir. 1972)	"Tied closed" trash bags placed near garbage cans several doors from "print shop."	U.S. Secret Service Agents investigating federal counterfeiting	Abandonment occurred when bags placed on sidewalk.
Magda v. Benson, 536 F.2d 111 (6th Cir. 1976)	Garbage bag on tree lawn next to street adjacent to residence	U.S. Postal inspectors investigating post office burglary	Abandonment; not within the residential curtilage.

CASE	SITUS OF GARBAGE CAN WHEN SEIZED	SEIZED BY	RATIONALE FOR DECISION
United States v. Shelby, 573 F.2d 971 (7th Cir. 1978)	Three covered garbage cans behind garage inside a low fence near alley	Sanitation workers at direction of F.B.I. agents investigating bank burglary	Abandonment; no reasonable expectation of privacy under *Katz v. United States*, 389 U.S. 347.
United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978)	Trash bags located at a non-designated place at the residence	Garbage haulers at direction of county police who then acquired trash	Placing for collection constitutes abandonment.
United States v. Vahalik, 606 F.2d 99 (5th Cir. 1979)	Garbage bags placed at edge of street for collection	D.E.A. agents investigating methamphetamine distribution	Abandonment when placed for collection.
United States v. Reicherter, 647 F.2d 397 (3rd Cir. 1981)	Outside the fence behind which the can was usually kept; it was moved out to facilitate collection	Philadelphia police and D.E.A. agents posing as garbage haulers	Abandonment when placed for collection.
United States v. Biondich, 652 F.2d 743 (8th Cir. 1981)	Garbage cans located near alley	Garbage collectors later asked by police to turn over garbage for search	Loss of privacy at time the garbage is picked up.
United States v. Terry, 702 F.2d 299 (2nd Cir. 1983)	Sealed and opaque trash bags placed on public sidewalk	D.E.A. agents	Placement of bags on public sidewalk constitutes inconsistency with privacy interest.

United States v. Kramer, 711 F.2d 789 (7th Cir. 1983)	On roadside in front of home for collection by private garbage haulers	Police investigators who took bags to police station and searched them on floor of station	No violation of reasonable expectation of privacy.
United States v. Thornton, 746 F.2d 39 (D.C. Cir. 1984)	Trash bag	Police officers investigating gambling operation	No reasonable expectation of privacy.
United States v. Michaels, 726 F.2d 1307 (8th Cir. 1984)	Communal trash bin of 16 unit apartment complex; separate individual bags within	Alcohol, Tobacco, Firearms Agents	No reasonable privacy interest after placing trash in area for pick-up.
United States v. O'Bryant, 775 F.2d 1528 (11th Cir. 1985)	Briefcase discarded next to overflowing trash bin on a busy city street	Police officer	Inventory search to identify the owner.
United States v. Dela Espriella, 781 F.2d 1432 (9th Cir. 1986)	Trash containers placed at curbside for collection	Federal agents	Warrantless search of abandoned property does not violate 4th Amendment.

REPRESENTATIVE GARBAGE CAN CASES

STATE COURTS

CASE	SITUS OF GARBAGE CAN WHEN SEIZED	SEIZED BY	RATIONALE FOR DECISION
State v. Brown, 200 Ohio App. 3rd 36, 484 N.E. 2d 215 (1984)	Plastic garbage bag placed at curb in front of an apartment building	Police who posed as garbage collectors, even borrowing the city garbage truck	Voluntary abandoned property.
State v. Oquist, Minn., 327 N.W. 2d 587 (1982)	Two plastic garbage bags near public alley behind the home	Police	Householder *does* have expectation of privacy in some garbage can circumstances, but not in this case; *United States v. Biondich*, 652 F.2d 743 (8th Cir. 1981) was noted.
State v. Schultz, Fla. App., 388 So.2d 1326 (1980)	"Swale area" in front of private home—5 green, opaque plastic bags, 2 silver trash cans	Police, who removed them to a secured remote area for examination by several other officers	No reasonable expectation of privacy, unsupported by any analysis; but see erudite dissent at 388 So.2d 1326, 1329.

F. Notwithstanding any other contentions about whether the citizens of America, in general, are entitled to a reasonable expectation of privacy in their domestic garbage cans, it is clear that respondent Rooney occupies a status of reasonable expectation of privacy in his garbage cans/communal garbage bin.

That reasonable expectation of privacy in the domestic garbage cans has existed in California since 1969. In *People v. Edwards,* 71 Cal.2d 1096, the Supreme Court of California held that trash placed in a trash can located in the defendant's back yard was not abandoned, and police violated the defendant's Fourth Amendment rights by vaulting his rear yard fence, entering upon his property, and rummaging in his trash can.

Two years later, the Supreme Court of California reaffirmed the Edwards analysis in *People v. Krivda,* (1971) 5 Cal.3rd 357. In *Krivda,* the garbage can was placed at curbside to await pick-up by the garbage haulers. Police, desiring to search it, intercepted the garbage truck, convinced the driver to empty the well of the truck to avoid commingling of Krivda's garbage, dump the garbage can of interest into that empty well, and drive down the street to allow the police to search it at their leisure.

Even though the can was placed at curbside, and thus police did not have to trespass on the property to seize it, the California High Court, in an extensively analyzed opinion, held, inter alia, that:

> ". . . The placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public . . . Under such circumstances we hold

> that defendants had a reasonable expectation of privacy that their trash would not be rummaged through and picked over by police officers acting without a search warrant . . ." (5 Cal.3rd 357, 366-367)

People v. Dumas, (1973) 9 Cal.3rd 871 reaffirmed the protection, holding that the "secondary degree of protection [that] applies to automobiles . . . also appears to apply to a trash can placed by the curb for the disposal of its contents . . ."

Of course, respondent's own case decision, *People v. Rooney,* 175 Cal.App.3rd 634, 221 Cal.Rptr. 49 (1985), noted that *Edwards* and *Krivda* were still the viable law of California, affording California residents a reasonable expectation of privacy in their domestic garbage cans against warrantless, non-probable cause, non-consensual searches by police.

Rooney was followed by *People v. Greenwood,* 182 Cal.App.3rd 729, 227 Cal.Rptr. 539 (1986).

It is inescapable, therefore, that respondent was entitled to a reasonable expectation of privacy in his garbage albeit contrary authority appertained in other jurisdictions.

Any change in the law of California should not be made retroactive because of this well-established law governing California garbage can seizures and searches entitling California residents to rely on this protection, believing that they had a reasonable expectation of privacy.

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CONCLUSION

Where police intend to seize and search a domestic garbage can/trash bin, at a specific location, for evidence of crime, a search warrant should be obtained. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 2047.

If exigent circumstances exist, and probable cause exists to believe the can contains contraband, it may be reduced to police custody and a warrant obtained. *United States v. Chadwick,* 433 U.S. 1.

Logical analysis as to the methods of professional garbage collectors, amateur/professional scavengers, children, and animals, and application of available police personnel, dictate a reasonable expectation of privacy in the domestic garbage can. Like the spoken word on the telephone (*Katz v. United States,* 389 U.S. 347), the contents of the domestic garbage can are often so intimate to life itself as to engender a desire on the part of the citizens that police not be sanctioned to perform warrantless, non-probable cause, non-consensual searches in garbage cans.

The cases upholding garbage can searches do so on the superficial, lack of analysis conclusion that "abandoned" property carried no 4th and 14th Amendment expectation of privacy.

California citizens stand in a different position because of *People v. Edwards,* 71 Cal.2d 1096 and *People v. Krivda,* 5 Cal.3rd 357 as to a reasonable expectation of privacy in domestic garbage cans, disallowing warrantless, non-probable cause, non-consensual search of garbage cans.

Respondent Rooney thus has demonstrated a reasonable expectation of privacy in the communal trash bin,

and the judgment of the California Court of Appeal in *People v. Rooney*, 175 Cal.App.3rd 634, 221 Cal.Rptr. 49 (1985) must be affirmed.

Respectfully submitted,

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No. 85-1835

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

On Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division Seven

REPLY BRIEF

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EDITOR'S NOTE:

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INTRODUCTION

Respondent argues in his brief that he had a reasonable expectation of privacy with respect to his garbage after he had placed it in the communal trash bin, and that therefore he cannot be deemed, for Fourth Amendment purposes, to have abandoned it.[1/] His argument has been essentially anticipated in all its salient aspects in our opening brief and in the briefs *amici curiae* submitted by the State of California *et al.* and the Americans for Effective Law Enforcement, Inc. *et al.* We shall, nevertheless, discuss a few matters raised by respondent and in the *amicus curiae* brief submitted by the California Public Defenders Association.

Before we proceed to do so, we first briefly point out how respondent's effort to establish his position involves him in serious

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1. Respondent's brief asserts that the police officers found a closed brown paper bag. (See, e.g., pp. 4, 6, 8, 9, 11.) However, the search warrant affidavit merely refers to a "brown paper shopping bag" without indicating whether it was open or not. (JA 21.) Although the record is silent on this point, we are willing to assume that the bag was closed for the sake of argument.

analytical difficulties. He initially claims that papers in a garbage container "are not abandoned in the reasonable expectation of privacy sense." (Brief of Respondent, p. 12.) This position is in harmony with the holding in People v. Krivda, 5 Cal.3d 357, 95 Cal.Rptr. 62, 468 P.2d 689 (1971) (vacated and remanded sub. nom. California v. Krivda, 409 U.S. 33 (1972) and reissued 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457 (1973)) that a reasonable expectation of privacy existed with respect to trash contained in sacks within the well of the refuse collectors' truck after these sacks had been removed from defendants' trash cans. But respondent also inconsistently maintains that "the contents [of a garbage container] achieve their [constitutional] protection derivatively by virtue of being within the key protected garbage can." (Brief of Respondent, p. 13.) This contention is, however, inconsistent with the Krivda holding that a reasonable expectation of privacy can pertain to a person's trash after it has been removed from his container

by trash collectors. Fatal to the contention that trash is only derivatively protected by virtue of being within a person's trash container is the doctrine, implicitly held by this Court, that a search warrant is not required with respect to a container which does not support a reasonable expectation of privacy with respect to its contents. (Texas v. Brown, 460 U.S. 730 (1983); Arkansas v. Sanders, 442 U.S. 733, 764 n. 13 (1979); United States v. Ross, 456 U.S. 798, 814 n. 19 (1982).) Perhaps it is respondent's inconsistent position about whether there is a per se reasonable expectation of privacy with respect to the contents of a trash container that explains why he is ambivalent as to whether a search warrant is required to search a trash container, given probable cause, because of its mobility. (Brief of Respondent, pp. 10-11.)

ARGUMENT

THE FOURTH AMENDMENT DOES NOT COMPEL A STATE TO ADOPT AN EXCLUSIONARY RULE AS A SANCTION FOR A VIOLATION OF AN EXPECTATION OF PRIVACY DEEMED UNREASONABLE UPON INDEPENDENT STATE GROUNDS

Respondent contends that he had a Fourth Amendment right with respect to his garbage in the communal trash bin because he, "being a California citizen, had an already heightened, established, judicially determined reasonable expectation of privacy in his garbage." (Brief of Respondent, p. 8.) Respondent urges that "[t]his existing law governed the illegal seizure of his garbage from the communal trash bin of the subterranean garage of his apartment and any change in that law must be non-retroactive as to respondent." (Ibid.)[2/]

The amicus curiae brief of the California Public Defenders Association similarly urges

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2. Respondent essentially repeats this contention at pages 41-42 of his brief.

that suppression of evidence is mandated under the Fourth Amendment if evidence is illegally seized in violation of state law and in violation of an expectation of privacy which is deemed reasonable by state law.

These contentions are made seemingly unmindful that this Court has already spoken on the matter.

In Cooper v. California, 386 U.S. 58 (1967), this Court explained that its holding, that the warrantless examination of a car validly held by officers for use as evidence in a forfeiture proceeding was not unreasonable,

> does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so. And when such state standards alone have been violated, the State is free, without review by us, to apply its own state harmless-error rule to such errors of state law. There being no

> federal constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless-error rule.

(Id. at 62. Fn. omitted.) Since a state having such higher standards is free to apply its own harmless-error rule as to violations of such standards, it must a fortiori also be free to not have a rule providing sanctions for violations of such standards.

The California Supreme Court candidly recognized the impact of the adoption of the "truth-in-evidence" provision of the California Constitution (Cal.Const., art.I, §28(d)), when it explained in In re Lance W., 37 Cal.3d 873, 886-887, 210 Cal.Rptr. 631, 694 P.2d 744, 752 (1985):

> What would have been an unlawful search or seizure in this state before the passage of that initiative would be unlawful today, and this is so even if it would pass muster under the federal Constitution. What

> Proposition 8 does is to eliminate a judicially created remedy for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled.

The argument that violations of reasonable-expectation-of-privacy standards based solely upon independent state grounds are ipso facto violations of federal reasonable-expectation-of-privacy standards is clearly semantic legerdemain which, it should be noted, was not even raised in the courts below in the the instant case.

The brief of the California Public Defenders Association presents a concatenation of contentions in support of their position. We consider them briefly in turn.

First, pages 7-8 of that brief rely upon quotations from Katz v. United States, 389 U.S. 347, 350-351 (1967) and Rakas v. Illinois, 439 U.S. 128, 143-144 n. 12 (1978) for the

proposition that this "Court's reference to property law in conjunction with society's 'understandings' points to state law as the logical source for such law because property law is viewed as a preserve of the states." But these cases do not even come close to showing that the Fourth Amendment somehow incorporates a state's higher reasonable-expectation-of-privacy standards, albeit that such standards are not required by the federal Constitution. Nor is this argument buttressed by references to Board of Regents v. Roth, 408 U.S. 564 (1972) and Paul v. Davis, 424 U.S. 693 (1976). These cases simply assert that the procedural safeguards of federal due process apply to liberty and property interests which exist by virtue of State law.

Next, amicus contends, at page 10 of its brief, that the application of local or state standards for the determination of what is obscene as a matter of federal constitutional law supports the contention that the Fourth Amendment incorporates a state's higher reasonable-of-expectation-of-privacy standards.

But this Court's explanation of the matter does not help amicus. In Miller v. California, 413 U.S. 15, 30 (1973) this Court stated:

> Under a national Constitution, fundamental First Amendment limitations on the power of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the 'prurient interest' or is 'patently offensive.' These are essentially questions of fact, and our nation is simply too big and too diverse for this Court to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.

Finally, in further support of its thesis, amicus notes at page 10 of its brief that "[t]his Court has often specifically referred to state law to determine the validity of arrests made by state and federal

officers. ([Citations].)" Even assuming arguendo that this statement is not open to question or qualification[3/], it does not tend to support the position of amicus. Consideration of these matters relates only to issues as to what does or does not constitute a reasonable invasion of privacy interests already determined to be reasonable. On the other hand, determination of what is or is not a reasonable expectation of privacy under the Fourth Amendment necessarily does not involve issues pertaining to the validity of arrests, searches, seizures or entries by law enforcement officers.

Ultimately, the essence of the contention made by respondent and the California Public Defenders Association is that when a state characterizes a particular expectation

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3. For example, Professor Wayne F. LaFave states: "There thus would appear to be no Fourth Amendment barrier to a state court holding, as a few have, that the exclusionary rule will not be utilized to deter violation of state statutory provisions limiting warrantless arrests." (2 SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987) § 5.1(c), p. 405, fn. omitted.)

of privacy as reasonable based solely upon independent state grounds, that expectation of privacy must also be characterized as reasonable as a matter of federal constitutional law. The reductio ad absurdem of this position, as we see it, is that every violation of a state search-and-seizure constitutional provision is automatically a violation of the federal Constitution. But this result would be inconsistent with the doctrine that a state cannot purport to be applying the Fourth Amendment to invalidate a search when it insists on a more demanding standard under its own Constitution or statutes. (New Jersey v. T.L.O., 469 U.S. 325, 343 n. 10 (1985).)

CONCLUSION

Respondent has failed to show that the test of abandonment for Fourth Amendment purposes is based upon the reasonable expectation of privacy doctrine. Moreover, in the sense used by this Court, respondent did not have a reasonable expectation of privacy with respect to the garbage within the communal trash bin,

assuming arguendo that its contents were his effects within the meaning of the Fourth Amendment.

For the reasons set forth in this and in our opening brief, we urge this Court to hold that there is no Fourth Amendment interest in trash once that trash has been set outside a person's residence for collection by the trash collector. A home may be a person's castle but once that person's effects have been placed outside the castle for collection, they constitute abandoned property for the purposes of the Fourth Amendment.

Respectfully submitted,

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No. 85-1835 (5)

In The

Supreme Court of the United States

October Term, 1986

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Petitioner,

v.

PETER ROONEY,

Respondent.

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MOTION TO FILE BRIEF AND BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE LEGAL FOUNDATION OF AMERICA, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE PETITIONER.

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AND THE
NATIONAL SHERIFFS' ASSOCIATION,
IN SUPPORT OF THE PETITIONER.**

MOTION OF AMICI CURIAE TO FILE BRIEF

Come now Americans for Effective Law Enforcement, Inc., *et al.*, and move this Court for leave to file the attached brief as *amici curiae,* and declare as follows:

1. *Identity and Interest of Amici Curiae.* The *amici curiae* are described as follows:

Americans for Effective law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-six times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The Legal Foundation of America (LFA), is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. LFA does not accept private fees and is supported by grants from the public.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publication, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America,

consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting the rights guaranteed to all under the Fourteenth Amendment.

2. *Desirability of an Amici Curiae Brief.* *Amici* are professional associations representing the interests of law enforcement agencies at the national, state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are charged with the responsibility, *inter alia*, of obtaining and executing arrest and search warrants and making warrantless arrests and searches, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors-including active law enforcement administrators and counsel-we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court. We respectfully ask this Court to consider this information in reaching its decision in this case.

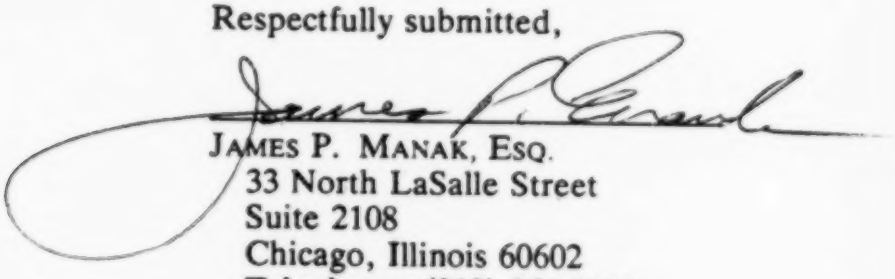
3. *Reasons for Believing that Existing Briefs May Not Present All Issues.* AELE, IACP, LFA, NDAA, and NSA are national associations, and their perspective is nationwide. This brief concentrates on policy issues, including the values served by the reasonable expectation of privacy under the Fourth Amendment, and the need to give law enforcement agencies clear guidance with respect thereto. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these.

4. *Avoidance of Duplication.* Counsel for *amici curiae* has reviewed the Petition for Certiorari and has conferred with counsel for Petitioner in an effort to avoid unnecessary duplication. It is believed that this brief presents several issues that are not otherwise raised.

5. *Consent of Parties or Requests Therefor.* Counsel has requested consent of all parties. The consent of Petitioner has been received, and the consent has been filed with the clerk of this Court. This Motion is necessary because counsel for Respondent has not, as of the time of filing, granted consent to the *amici.*

For these reasons, the *amici curiae* request that they be granted leave to file the attached *amici curiae* brief.

Respectfully submitted,



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INTEREST OF AMICI CURIAE

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the

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ARGUMENT

THERE IS NO REASONABLE EXPECTATION OF PRIVACY FOR PURPOSES OF THE FOURTH AND FOURTEENTH AMENDMENTS WITH RESPECT TO GARBAGE AND TRASH PLACED IN AN AREA ACCESSIBLE TO THE PUBLIC.

The court below, *People v. Rooney,* 175 Cal. App.3d 634, 221 Cal. Rptr. 49 (1985), ruled, *inter alia,* that a common trash bin shared by apartment dwellers is comparable, for Fourth Amendment purposes, to automobiles, rather than to "open fields" or the "curtilage" of dwellings, and that, therefore, a warrantless search of such trash bin requires both probable cause and exigent circumstances.

The trash bin in question was approximately 8' x 4' x 5' and filled to capacity, and was located in a subterranean garage of a 28-unit apartment building. The officers had information from an informant that the defendant was accepting sports gambling bets at a telephone number registered to an occupant of one of the apartment units. Acting on the information, they searched the bin without a warrant, finding evidence linking the defendant to gambling offenses. The bin was filled with all manner of trash from tenants and possibly others, and the material had been thrown into one common, unsegregated mass.

The court below specifically stated that the garage and bin were accessible to the public and framed the issue before it thusly: "The issue before us is the reasonableness of defendant's expectation of privacy in a bag of trash placed in a communal trash bin located in the apartment's garage, an area accessible to the public." 175 Cal. App.3d at 641; 221 Cal. Rptr. at 53.

Amici curiae will not duplicate the case law analysis presented by the Petitioner State of California in this case, although we agree with that analysis. Instead, we will concentrate upon different issues and issues of policy that concern our law enforcement constituency.

We note, however, that the issues involved in this case could readily have been resolved by the court below by the application of several cases from courts that have dealt with the issue of abondonment, see LaFave, Search and Seizure (1978), Section 2.6 (b) and 1986 Supplement, and searches of trash containers. *See e.g., United States v. Harruff,* 352 F. Supp. 224 (E.D. Mich. 1972); *Smith v. State,* 510 P.2d 793 (Alaska 1973); *Willis v. State,* 518 S.W.2d 247 (Tex. Crim. 1975).

In *Smith v. State,* for example, the police, on suspicion that narcotics activity was taking place in a particular unit of an apartment building, searched a dumpster located next to the building and found evidence that was used to obtain a search warrant for an apartment. The *Smith* court stated in finding no violation of the Fourth Amendment:

> No attempt was made to empty the bags or boxes or to commingle their contents with the collective mess of garbage. Any person later emptying refuse in the dumpster could easily segregate the items placed therein by the Smiths. * * * [T]his dumpster accommodated several apartments. Therefore many people living in the building-and certainly the superintendent-would conceivably have occasion to look into it and scavenge about in the collective heap.

510 P.2d at 797-798.

The court further noted that, " . . . it would be reasonable to expect trash to be accidentally removed * * * by running children, passing cars, stray dogs, or even a visitor." 510 P.2d at 798.

It is submitted that *Smith* and other cases that have found no violation of the Fourth Amendment in the search of trash

containers, whether they be individual containers belonging to one person, or communal containers as in the instant case, recognize a fundamental fact of life in modern society. It is common knowledge, as recognized by these courts, that trash containers play a unique role in our society. Not only are they used for the placement *into* them of refuse and trash by large numbers of people (including many nonresidents of the houses or apartment complexes to which they are often attached, such as passers-by and other neighborhood residents), but they are commonly known to be visited by a wide array of persons, some of whom stop and rummage and remove material *out of* them: other apartment dwellers and neighbors, passers-by, curiosity seekers, itinerant trash pickers, [1] children at play, and - in increasing numbers - a distinct group that might be called "dedicated non-professional scavengers," people who for environmental, hobby, or monetary reasons collect certain forms

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[1] For references to the common activities of the homeless mentally ill in our large cities in obtaining their daily needs from trash containers, see Goleman, "To Expert Eyes, City Streets Are Open Mental Wards," New York Times, November 4, 1986, pp. 21, 22:

> "... seen through the eyes of a mental health worker, Broadway is a very different street. The swank and style recede, and a bent old woman in a filthy coat, fishing a slice of bread from the garbage can by Zabar's, and a man wrapped in a grimy blanket, huddled on the sidewalk by Lincoln Center talking earnestly with no one, come into focus. * * *
>
> This is the Broadway polite eyes avoid, an open psychiatric ward where those with severe mental illness find asylum of sorts in a bench or doorway. Broadway, with its busy traffic and mall-like traffic islands with benches, seems to be one of those public spaces that invites the mentally ill to set up housekeeping. And what is happening there is typical of many other streets and parks in cities throughout the country. * * * The woman who had retrieved bread from the garbage can by Zabar's for instance, pulled herself into a dignified huff and marched across the street. There, she found the remains of a pizza in another garbage can."

of trash in easily accessible areas such as roads, parkways, embankments, sidewalks, alleys and ways, junk deposited in front of dwellings, trash barrels, dumpsters, and communal trash bins.

People in this latter group frequently look for specific items, such as furniture or clothing that can be sold at flea markets and garage sales, or beverage containers that can be sold to recycle firms or returned to stores for payment of cash. Indeed, whole, relatively new industries depend in part upon their efforts in rummaging through other peoples' garbage. As noted in 28 Environment 22 (April 1986):

TURNING PLASTIC BOTTLES INTO WINDBREAKERS

> The soda bottle you recycle today could turn up in the windbreaker or rug you buy next year. A textile machinery distributor, Chima, in Reading, Pennsylvania, is introducing technology developed in West Germany for converting recycled PET (polyethylene terephthalate) bottles into polyester fabric. The process produces a polyester film that can be made into carpet backing, clothes, and imitation leather. *The Plastic Bottle Reporter,* Winter.

Even in states that require bottle purchasers to pay a deposit that is returned upon bringing the container back to a store, upwards of 30% of purchasers continue to throw bottles into their trash containers, making them available for those individual scavengers who walk the ways of our communities looking for trash that can be converted into cash. As noted in 27 Environment 23-24 (October 1985), bottle return laws have been well received in states that have passed them, thus fueling the recycling industry, and yet it is clear that a substantial number of bottles are still thrown out and are available for individual scavengers:

NEW YORK BOTTLE LAW GETS GOOD RETURNS

> After its first year in operation New York's beverage container deposit law has been a success, according to the results of a state-commissioned study. *The*

> *law led to a 70 percent reduction in bottle trash,* was responsible for a 5 percent to 8 percent reduction in landfill space used, and created over 3,900 recycling-related jobs, while the price of bottled beverages has remained fairly steady. About 75 percent of New Yorkers like the law, especially because it cuts down on litter. Pro-recycling groups in California hope people in their state will take such statistics to heart, as the voters there have yet to pass a bottle bill. (See Dave McNary, "Recycling: California's Bottle Battle," October 1982.) Florida voters will also decide on the issue this year. Nine other states have beverage container laws in place. (Emphasis added) –*Sierra*, September/October.

These facts are not novel. Every apartment dweller and home owner who places trash into a trash container accessible to the public knows that periodically a substantial portion of such trash disappears before the garbage or dumpster truck arrives. It is, as noted, a fact of life accepted by most people. Indeed *amici* can assure this Court that few law enforcement agencies from among our constituencies, receive complaints against such scavengers for trespass, loitering charges, or littering charges. Most such scavengers are quick, unobtrusive, and non-littering, if they expect to return to their routine in a particular location without interference.

Amici submit, however, that there is more involved in this case than the commonly known activities of scavengers, and the commonly accepted lack of privacy in trash containers. Some have argued that privacy, at bottom, is really the way Society looks at various elements of human conduct and certain "habits of life."

> Privacy, no less than good reputation or physical safety, is a creature of life in a human community and not the contrivance of a legal system concerned with its protection. We should not be misled, therefore, in speaking of a legally recognized interest in privacy or the rights attending it. Privacy in these contexts does not exist because of such recognition, but depends only upon habits of life.

Gross, *The Concept of Privacy*, 42 N.Y.U.L.Rev. 34, 36 (1967).

Yet this Court has endeavored to formulate a legal standard for the protection of the right to privacy, an effort that was presaged by the seminal work of Warren and Brandeis, *The Right to Privacy*, 4 Harv.L.Rev. 193 (1890), and an effort that *amici* applaud as vitally necessary to the maintenance of law and order in a free society. In *Katz v. United States*, 389 U.S. 347, 351, this Court set forth the legal standard thusly: "... the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection ..." The question of what constitutes an intrusion sufficient to constitute a search for Fourth Amendment purposes turns upon the *Katz* definition of "reasonable expectation of privacy," which has been regarded as having two elements: (1) the individual must have a *subjective expectation* that a thing or activity will be kept private, and (2) *society must objectively recognize the reasonableness of that expectation*. 389 U.S. at 361 (concurring opinion of Justice Harlan). *Cf., Hester v. United States*, 265 U.S. 57 (1924).

Amici submit, that it is time for this Court to re-examine the basic *Katz* formulation, and in particular, the requirement that "society must objectively recognize the reasonableness of that expectation." The decision of the court below flies in the face of reason. Modern realities of life would quickly convince any rational person that "society [does not] objectively recognize the reasonableness of [an] expectation" of privacy in the contents of trash containers visited by a small army of persons on a predictable basis.

Reason, common sense, and an application of the *Katz* formulation, did not prevail in the court below, and sometimes do not prevail in other courts. For example, the Supreme Court of Colorado recently held that "[A] person has a reasonable expectation that police officers will not subject his hands to an ultraviolet lamp examination to dis-

cover incriminating evidence not otherwise observable . . . " *People v. Santistevan*, 715 P.2d 792, 795 (Colo. 1986). Many equally strained applications of the *Katz* formulation can be found collected in LaFave, Search and Seizure (1978), Section 2.1(d) and 1986 Supplement.

Amici submit that many courts, such as the court below, have lost sight of the fact that, "The test of legitimacy is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 1743 (1984). It is time for this Court to elevate the second aspect of the *Katz* formulation from the concurring opinion of Justice Harlan, into a clear, ***bright line*** declaration that can be followed by law enforcement officers and understood by courts and the public.

We submit that Society - the majority of those who engage in the "habits of life" common to us all, would reject the notion that a person retains a ***reasonable*** expectation of privacy in trash cast into a trash container that is accessible to the public. We further submit that Society is not "prepared to recognize as 'reasonable' " a belief that contraband or evidence of crime placed in an area accessible to the public can *EVER* be shielded by the Fourth Amendment right to privacy. We ask this Court to give a clear, forthright declaration to that effect for the guidance of law enforcement officers. It is as noted by Judge (later Chief Justice) Burger in his dissent in *Work v. United States*, 243 F.2d 660, 665 (D.C. Cir. 1957):

> Honest citizens neither need nor, I think, want protection for their privacy extended to these artificial limits . . . Of course the guilty have the same protective safeguards as the innocent and I would afford them as much. But I refuse to join in what I consider an unfortunate trend in judicial decisions in this field which strain and stretch to give the guilty, not the same, but vastly more protection than the law abiding citizen.

CONCLUSION

Amici respectfully request this Court to (1) reverse the decision of the court below on the basis of law and sound judicial policy, (2) declare that WHENEVER CONTRABAND OR EVIDENCE OF A CRIME IS PLACED IN AN AREA ACCESSIBLE TO THE PUBLIC, IT LACKS CONSTITUTIONAL PROTECTION, and (3) declare that in any event the police in this case acted in good faith within the purview of the good faith exception to the exclusionary rule recognized in *United States v. Leon,* 468 U.S. 897, 104 S.Ct. 3405 (1984) and *Massachusetts v. Sheppard,* 468 U.S. 981, 104 S.Ct. 3424 (1984).

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No. 85-1835

Supreme Court, U.S.
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IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT

BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER BY THE STATES OF CALIFORNIA, ALABAMA, FLORIDA, ILLINOIS, INDIANA, KENTUCKY, MISSISSIPPI, NORTH DAKOTA, PENNSYLVANIA, SOUTH CAROLINA, VIRGINIA, WASHINGTON, WISCONSIN, WYOMING

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INTEREST OF AMICI CURIAE

This case presents a significant issue respecting the Fourth Amendment's application. At issue is whether the California court's constitutional distinction between police and others, such as garbage collectors, who examine trash set out for collection, is to be adopted by this Court. That approach calls into

question continued adherence to Katz v. United States, 389 U.S. 347 (1967) since it eliminates the need to exhibit an actual expectation of privacy in order to assert the Fourth Amendment's protection.

The Amici States have a direct interest in the resolution of this issue in view of its broad implications for a wide variety of search and seizure cases.

In addition, adoption of the California court's limitation on trash examination could lead to confusion among officials as to the sorts of garbage protected and a loss of confidence by the public in the ability of local law enforcement officers to carry out their duties in an appropriate manner.

This brief is filed pursuant to Rule 36.4 of the Court.

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SUMMARY OF ARGUMENT

The California Court of Appeal erred by abandoning the requirement that a person exhibit an actual expectation of privacy in the object of a claimed search as the threshhold test for Fourth Amendment protection.

Moreover, it incorrectly viewed respondent's asserted privacy expectation as reasonable, even though respondent placed his trash outside the curtilage for collection, manifesting his obvious intent to permanently disassociate himself from it and a desire for the government to actually take it. Respondent dispossessed himself of control over who could view his trash and failed to take obvious measures against its connection to him becoming known.

Distinctions between examination of trash by the garbage collector on one hand and trained police seeking evidence of crime on the other hand are inconsistent with this Court's precedent. Moreover,

the rule followed by the lower court, which depends upon whether trash has lost its "identity," violates the basic principle that the legality of challenged police actions does not turn upon their fruits.

It is precisely because garbage cans are not where we keep valued things that they lack association with personal privacy except in the home or curtilage as an adjunct of the family economy. Trash placed for collection outside the curtilage, or removed from the curtilage by the authorized collector, passes into a sphere where access by others is uncontrolled and privacy expectations in castaway property evaporate.

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ARGUMENT

AN INDIVIDUAL'S TRASH PLACED OUTSIDE THE CURTILAGE FOR COLLECTION OR REMOVED FROM THE CURTILAGE BY THE AUTHORIZED COLLECTOR IS NOT PROTECTED FROM GOVERNMENTAL EXAMINATION BY THE FOURTH AMENDMENT

A. No Subjective Privacy Expectation In Trash Is Exhibited When It Is Placed Outside The Curtilage Or Removed From The Curtilage By An Authorized Collector. Nor Is Any Such Expectation Reasonable.

A protected privacy interest exists under the Fourth Amendment if the individual exhibits an actual expectation of privacy in a particular thing and society is prepared to recognize that expectation as reasonable. See Smith v. Maryland, 442 U.S. 735, 740 (1979), quoting, Katz v. United States, 389 U.S. at 361 (Harlan, J., concurring).

When a person places trash outside the curtilage in an area immediately accessible to outsiders for it to be collected, the individual loses control over access to the deposited item by uninvited persons, and manifests an intent that government or its

agents take permanent possession of that property.

Whatever expectation people have respecting whether such trash will be maintained inviolate the inability to exclude others and the implicit renouncement of any desire to retain those things is counter to the very concept of manifesting desired privacy.

Exhibiting privacy expectations is required to ensure that the Fourth Amendment is not trivialized by extending protection to purely abstract or theoretical interests as well as to give police notice of claimed privacy to prevent unjustified intrusions in advance.

The California Court of Appeal abandoned any pretense of obedience to the first requirement of Katz. For this most basic of reasons, the court erred.[1]/

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1. The court dealt exclusively with the second prong of Katz by characterizing the issue as being "the

Even assuming arguendo that a privacy interest was exhibited, society does not recognize as reasonable expectations of privacy from government in trash placed for collection outside the home and curtilage thereof. Indeed the "overwhelming weight of authority rejects" the conclusion drawn by the California Court of Appeal. United States v. O'Bryant, 775 F.2d 1528, 1533 (11th Cir. 1985), quoting, United States v. Thornton, 746 F.2d 39, 49 & n. 11 (D.C. Cir. 1984). If a legitimate privacy expectation were found here, it can be argued with great force that trash bags in a curbside garbage can on a city street are equally protected.

However, even when garbage is placed for collection in the curtilage, e.g., on a back porch, once the authorized collector

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reasonableness of defendant's expectation of privacy in a bag of trash placed in a communal trash bin located in the apartment's garage, an area accessible to the public." People v. Rooney, 175 Cal.App.3d 634, 641-642, 221 Cal.Rptr. 49, 53 (1985).

removes it from the immediate surroundings of the home, with the owner's implied permission, trash simply is no longer private information absent perhaps special arrangements with the collector to keep it from public view. Consequently, the garbage's original owner takes the risk that it may be conveyed to police.2/ United States v. Biondich, 652 F.2d 743, 745 (8th Cir.), cert. denied, 454 U.S. 975 (1981); United States v. Shelby, 573 F.2d 971, 973-974 (7th Cir.), cert. denied, 439

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2. At most, the garbage collector in such a case is ". . . no different than an undercover agent for the state and 'an entry by an undercover agent is not illegal if he entered for the "very purposes contemplated by the occupant."' United States v. Ressler, 536 F.2d 208, 211 (7th Cir. 1976), quoting, Lewis v. United States, 385 U.S. 206, 211 (1966)." State v. Stevens, 123 Wis.2d 303, 367 N.W.2d 788, 794-795 cert. denied, __ U.S. __, 88 L.Ed.2d 125, 106 S.Ct. 151 (1985); see also United States v. White, 401 U.S. 745, 752 (1971) (plurality opinion); Hoffa v. United States, 385 U.S. 293, 302 (1966). Placing information in an envelope, a box or a trash bag before conveying it to a trash collector clearly does not change the individual's misplaced confidence in that person.

U.S. 841 (1978); see also State v. Purvis, 249 Ore. 404, 438 P.2d 1002 (1968); Croker v. State, 447 P.2d 122 (Wyoming, 1970).

Except in California, People v. Krivda, 5 Cal.3d 357, 96 Cal.Rptr. 68, 486 P.2d 1262 (1971), remanded, 409 U.S. 33 (1972), on remand, 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457, cert. denied, 412 U.S. 919 (1973), courts finding the Fourth Amendment violated with respect to trash have done so strictly in the context of an uninvited police entry into the curtilage without consent, or other justification. Fixel v. Wainwright, 492 F.2d 480, 483-484 (5th Cir. 1974) (fenced backyard of apartment building); Work v. United States, 243 F.2d 660, 662 (D.C. Cir. 1957) (underneath home's porch); State v. Broom, 113 Ariz. 495, 557 P.2d 1052, 1054 (1976) (fifteen feet behind home in place not open to garbage collector); State v. Chapman, 250 A.2d 203, 212 (Maine 1969) (inside garage under home); Everhart v.

State, 274 Md. 459, 337 A.2d 100, 114-115 (1975) (apparent farmhouse yard; remanded for determination); Bolen v. State, 544 S.W.2d 918, 920 (Tenn. Crim. 1976) (private area of home adjacent to private driveway); Ball v. State, 57 Wis.2d 653, 205 N.W.2d 353, 355-358 (1973) (home's backyard).

Respondent was faced with no such invasion of his home's privacy. The California Court of Appeal found the subterranean garage of respondent's apartment building was outside his curtilage, where he might enjoy a heightened expectation of privacy from uninvited police. People v. Rooney, 175 Cal.App.3d at 645, 221 Cal.Rptr. at 56.

Access to such garages is not controlled by individual tenants unlike the separate assigned areas where they enjoy exclusive privacy. United States v. Cruz Pagan, 537 F.2d 554, 557-558 (1st Cir. 1976); see also United States v. Stanley, 597 F.2d 866, 870 (4th Cir. 1979) (parking

lot of mobile home park not curtilage). Moreover, such communal garages are for use by anyone with business on the premises who, like the police, choose to enter the driveway. See Clerk's Transcript: 29. The garage was not a place associated with the "sanctity of a man's home and the privacies of life." Oliver v. United States, 466 U.S. 170, 180 (1984).

B. Arguments Offered For A Legitimate Privacy Expectation In Trash Placed For Collection Outside The Curtilage Are Not Consistent With The Fourth Amendment

The primary argument offered for a legitimate private expectation in trash set out for collection is the bare assertion that residents do not want castaway papers and effects examined by others. People v. Rooney, 175 Cal.App.3d at 641-642, 221 Cal.Rptr. at 53, quoting, People v. Edwards, 71 Cal.2d 1096, 1104, 80 Cal.Rptr. 633, 638, 458 P.2d 713, 718 (1969).

However, "once the trash is discarded

the former owner rarely has any further interest in it other than to be assured that it will not remain at his doorstep. In the rare instance when he desires to preclude inspection by others of private papers in his garbage he may do so by first shredding or burning them or by hand-delivering the papers to a garbage-grinding machine." United States v. Terry, 702 F.2d 299, 309 (2d Cir.), cert. denied, 461 U.S. 931 (1983).

A person like respondent, who places trash out for collection intact is an individual who has failed to take even the most obvious and readily available measures to keep their connection to himself private. "There is nothing unfair about requiring that people not discard things they want to keep secret, or destroy them before they do." United States v. Kramer, 711 F.2d 789, 792 (7th Cir.), cert. denied, 464 U.S. 962 (1983).

It is also claimed that people

anticipate "nonpolice third persons may rummage through and scavenge from one's trash barrels despite local ordinances prohibiting such behavior," People v. Rooney, 175 Cal.App.3d at 642, 221 Cal.Rptr. at 53, but that the probability of such occurrence does not create an expectation by individuals that police will rummage and retrieve evidence from trash. Ibid., citing, People v. Krivda, 5 Cal.3d 357, 366-367, 96 Cal.Rptr. 62, 68-69, 486 P.2d 1262, 1268-1269 (1971). The argument is that placing trash in a public area for collection is not "necessarily an abandonment of one's trash to the police or general public." Id. at p. 366, 96 Cal.Rptr. at 68, 486 P.2d at 1268. Rather, the trash is abandoned only to "persons authorized to remove the receptacle's contents, such as trash men." People v. Edwards, 71 Cal.2d at 1104, 80 Cal..Rptr at 638, 458 P.2d at 718. It is only when trash is commingled to the point of losing

its "identity" that individuals lack an expectation of privacy as against police in their garbage. Ibid; People v. Krivda, 5 Cal.3d at 366-367, 96 Cal.Rptr. at 68-69 486 P.2d at 1268-1269.

This kind of distinction between police and third persons, was repudiated last Term in California v. Ciraolo 476 U.S. __, 90 L.Ed.2d 210, 106 S.Ct. 1809 (1986). There the Court was confronted with the argument that police aerial observation of a fenced backyard was a search because the flight was specifically directed at identifying marijuana by police officers who were trained to recognize such crops from airplanes. Characterizing those facts as "irrelevant", this Court noted: "Such observation is precisely what a judicial officer needs to provide a basis for a warrant." 476 U.S. at ___, 90 L.Ed.2d at 217, 106 S.Ct. at 1813.

"[A] person has no legitimate expectation of privacy in information he

voluntarily turns over to third parties." Smith v. Maryland, 442 U.S. at 743-744. There is no reason to suppose that legitimate expectations of privacy subsist in trash placed in publicly accessible areas for the garbage collector.

To begin with, garbage disposal is generically governmental. It is undertaken by public employees or private industry by licensing. Moreover, unlike the mail, government or its agents are both the deliverer, and, almost always, the final intended recipient of trash. What is more, government and its agents are widely and approvably engaged in examining trash--frequently before it loses its "identity." Government must ensure compliance with size and weight limitations on disposable material; segregate reusable or nonputrescible items; and remove toxic or other dangerous matter.

Absolutely no evidence exists that individuals expect the government not to

examine trash from which the original owners obviously intend to permanently disassociate themselves and which they just as obviously intended for the government to actually take. As noted, government routinely does examine trash. That police have reasons different from sanitation workers for the examination is not a distinction of constitutional magnitude. California v. Ciraolo, supra.

Nor does the Fourth Amendment legitimate expectations of privacy in trash set out for collection based upon local ordinances that prohibit unlicensed persons collecting from or tampering with trash containers. Compare People v. Krivda, 5 Cal.3d at 366, 96 Cal.Rptr. at 68, 486 P.2d at 1268.

First, such ordinances do not restrict a licensed collector from conveying trash to police after regular collection but before loss of the trash's "identity." Police neither collect from nor tamper with

trash containers when garbage is examined somewhere else, e.g., the well of a garbage truck.3/

Second, it is government which decides whether to license trash collecting by third parties and regulates with almost complete independence how collection is made. It is hardly reasonable to believe licensees acquire collection rights which garbage owners rely upon to secure privacy of their trash. Unless this Court was prepared to hold that the Fourth Amendment is balkanized into so many discrete units according to each municipality's collection

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3. In practical terms, acceptance of an expectation of privacy in respondent's apartment building trash bin would mean officers merely would wait for the trash collector to collect and examine the trash in the garbage well of the truck. "It is not easy to see how such a requirement would advance legitimate privacy interests." Oliver v. United States, 466 U.S. at 179, n.9. We assume therefore that respondent's argument rests on the broader Krivda theory that the Constitution affirmatively prohibits police from standing at the garbage collector's elbow as identifiable trash is revealed in the collection process.

system, it could not possibly make any difference what collection scheme was chosen. See Magda v. Benson, 536 F.2d 111, 113 (6th Cir. 1976) (trash ordinance a matter of local not constitutional law); United States v. Dzialak, 441 F.2d 212, 213 (2d Cir.) (trash ordinance does not affect abandonment), cert. denied, 412 U.S. 919 (1973).

Third, this Court has recognized that public health considerations underlie local ordinances regulating disposal and destruction of garbage and other refuse. California Reduction Co. v. Sanitary Reduction Works, 199 U.S. 306, 316-317, 319-324 (1905). Additionally such ordinances are "typically enacted to protect the exclusive right of a city or its authorized agent to collect the trash. (See 7 McQuillan, Municipal Corporations, p. 96, § 251, and cases cited therein.)" People v. Krivda, 5 Cal.3d at 368, n.1, 96 Cal.Rptr. at 69, 486 P.2d at 1269 (Wright,

C.J., dissenting.)

One court has remarked in upholding police collection of garbage bags from the curb fronting an apartment building:

> "In our estimation, it is unreasonable to suggest that the intent in passing the ordinance [prohibiting removal of trash from the street except with the owner's consent] was to impede law enforcement authorities in the performance of otherwise lawful investigative activities. To us, at least, it seems clear that the purpose of the enactment extends no further than to serve the orderly and efficient removal of trash by the waste collection department." State v. Brown. 20 Ohio App.3d 36, 484 N.E.2d 215, 218 (1984).

Consistent with the view that such ordinances are not intended to enhance privacy, there is no evidence here that respondent relied upon or even knew of any ordinance on which to base a privacy expectation. See United States v. Vahalik, 606 F.2d 99, 101 (5th Cir. 1979).

Respondent's claim lacks any roots in "concepts of real or personal property law or understandings that are recognized and permitted by society." Rakas v. Illinois,

439 U.S. 128, 143-144, n.12 (1978). Respondent does not take issue with his abandonment of the trash "in a personal property sense." See Pet. Oppo.: 22. And the argument that society recognizes a partial expectation of privacy from police examination of trash placed for collection outside the curtilage until it loses its "identity" is mistaken.

First, it makes no sense to say that respondent abandoned his trash in the strict property law sense to the government but that he reasonably expected the government not to notice that trash. "Having placed the trash in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it, it is inconceivable that the defendant intended to retain a privacy interest in the discarded objects. If he had such an expectation, it was unreasonable." United

States v. Reicherter, 647 F.2d 397, 399 (3d Cir. 1981).[4/] Thus, if respondent did not discard and throw away his property in the essential act and with the intent of abandoning it, it is difficult to imagine precisely what it was doing in a trash bin.

Second, cessation of the claimed expectation of privacy from police when garbage loses its "identity by being mixed and combined" with other trash, People v. Krivda, 5 Cal.3d at 367, 96 Cal.Rptr. at 68, 486 P.2d at 1268, reflects an unsupportable view of the Fourth Amendment. Under this theory, garbage does not enjoy permanent Fourth Amendment protection; instead, refuse remains private only until

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4. Abandonment is not dependent upon an individual's lack of concern for the ultimate placement or destination of a discarded item. The defendants in Hester v. United States, 265 U.S. 57 (1924) and Abel v. United States, 362 U.S. 217 (1960) assuredly hoped the items they threw away would not fall into the hands of the government since they had not lost their identity. Nevertheless, this Court found the items were abandoned.

its commingling makes the task of gathering evidence difficult and unpleasant for the police. Whether or not one's trash will lose its identity and evidentiary utility before commingling cannot be reliably predicted at the time it is discarded. It is not a reasonable expectation of privacy that depends as much upon chance as upon the Constitution.

To avoid this conceptual embarrassment, proponents of the commingling theory urge that if the police feel that the cake is worth the candle, the legality of their subsequent sifting turns on whether the item discovered has evidentiary value, i.e., identity. If it does, they argue, the police have "searched" because the trash was not sufficiently commingled; if nothing of evidentiary significance is found because the trash was adequately commingled, the police may have looked long and hard but they have not "searched." This theory thus

resurrects the rejected notion that the legitimacy of government's action should depend on what turns up. See United States v. Jacobsen, 466 U.S. 109, 144 and n.9 (1984) (cases cited).

Sifting a garbage can is undoubtedly an unpleasant task. Its unwholesomeness is its own self-regulating limitation as a technique of police surveillance. By the same token, it is precisely because garbage cans are not where we keep valued things that they lack association with personal privacy except in the home or curtilage as an adjunct of the family economy.

This limitation arises not so much from the need to protect garbage as the need to protect people in the home and curtilage from police entry. When trash is placed for collection, or is removed by the authorized collector from within the curtilage, it passes into a categorically different and far more public sphere where access by others is uncontrolled and any

privacy expectations in castaway property evaporate. Since respondent placed his garbage outside the curtilage for collection, any expectation of privacy was not protected by the Fourth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted the judgment of the California Court of Appeal should be reversed.

DATED: November 26, 1986

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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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No. 85-1835

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

STATE OF CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

ON WRIT OF CERTIORARI TO THE
CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The California Public Defenders Association is a statewide organization of publicly-employed defense attorneys. As legal representatives for the indigent accused these attorneys are responsible for insuring that

their clients' constitutional rights are fully protected. No such right is more precious than the right to privacy and freedom against unreasonable searches and seizures by the government which is embodied in the Fourth Amendment to the United States Constitution. This organization has a profound interest in the important question litigated herein, i.e., whether there is a reasonable expectation of privacy in contents placed in a communal trashbin located in a subterranean garage to an apartment complex. Resolution of this question would likely affect numerous cases routinely handled by deputy public defenders across California.

This brief does not repeat any arguments advanced on behalf of respondent Rooney by his learned counsel, but instead focuses on the operation of substantive state law on defining the scope of a reasonable expectation of privacy under the Fourth Amendment. Consent to the filing of this amicus brief has been obtained from counsel for petitioner and respondent, whose letters to that effect are being filed under separate cover concurrently with the brief.

SUMMARY OF ARGUMENT

It is beyond question that at least since Katz v. United States, 389 U.S. 347 (1967), the scope of the Fourth Amendment is defined in terms of expectations of privacy. Legal definitions and concepts of privacy have historically been associated with state law. Should not state law (to the extent there is such law) be relevant to and perhaps determinative of the question of whether a reasonable expectation of privacy exists in a given situation?

Amicus curiae contends herein that California decisional law on the subject of expectations of privacy in trash containers is relevant to the question of whether a California resident has a reasonable expectation of privacy in trash containers under the Fourth Amendment. Pursuant to ample precedent from this Court, this decisional law should control the primary question litigated herein.

The main response to the above-proposed contention is likely to be based on the "Truth-in-Evidence" provision of the state constitution, enacted by the voters through the initiative and

referendum process, which states in pertinent part: "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceedings . . . " (Cal. Const., art I, § 28(d).) Of course the literal language of this provision would mandate that any evidence tainted by a violation of the Fourth Amendment, no matter how egregiously, would nonetheless be admissible at trial if relevant.

It is recognized by all parties in California, however, that the truth-in-evidence provision is necessarily limited by substantive rulings from this Court on the Fourth Amendment, and that an individual's federal constitutional rights cannot be abrogated by the voters using the initiative and referendum process in a state election. The asserted purpose of the truth-in-evidence provision is to conform California law regarding the exclusionary rule to the precise boundaries of substantive Fourth Amendment law as interpreted by this Court. However, the critical point which will be emphasized by amicus herein is that the voters of California did not repeal the independent

provisions of the California Constitution which grant citizens of California privacy expectations greater than that recognized by this Court. The only effect of the law adopted in California was to provide that evidence could not be suppressed under the California Constitution, even though it was illegally seized under that Constitution, or even the federal Constitution. Thus, in the instant case, whether or not the evidence seized is suppressed, it is unquestionable that the seizure was illegal under California Constitutional law.

The question thus presented is whether the federal Constitution will protect the manifestly reasonable privacy expectations of State citizens guaranteed by State Constitutions when the State does not itself authorize suppression of evidence as a sanction for illegal conduct. This is a unique question of first impression to this Court. To amicus' knowledge, there is no other state in the union which recognizes the doctrine of "independent state grounds" to determine the legality of a search or seizure, yet does not require

the suppression of evidence determined to have been illegally seized under state law. The issue that amicus accordingly presents for this Court's resolution is this:

"If evidence is illegally seized in violation of State law and in violation of a State citizen's reasonable expectation of privacy recognized by State law, is suppression of that evidence mandated under the Fourth Amendment to the United States Constitution?"

ARGUMENT

I

THIS COURT HAS PREVIOUSLY LOOKED TO STATE LAW TO DETERMINE THE SCOPE OF A RIGHT PROTECTED UNDER THE FEDERAL CONSTITUTION AND SHOULD DO SO IN DETERMINING IF RESPONDENT HAD A REASONABLE EXPECTATION OF PRIVACY IN THE TRASH BIN IN HIS GARAGE

This Court recognized in Katz v. United States, supra, that the laws of the individual states were responsible for the protection of a person's general right to privacy, that right existing aside from any federal constitutional right:

> "The protection of a person's general right to privacy — his right to be left alone by other people —is, like the protection of his property and of his very life, left largely to the law of the individual states." (389 U.S. at pp. 150-151.)

It is recognized that not only "general" privacy law, but substantive Fourth Amendment law which defines reasonable expectations of privacy, is also necessarily grounded in state law. Thus it was stated in Rakas v. Illinois, 439 U.S. 128 (1978):

> [I]t would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in

> criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." (Id., at pp. 143-144, fn. 12.)

The Court's reference to property law in conjunction with society's "understandings" points to state law as the logical source for such law because property law is viewed as a preserve of the states. As was noted in Board of Regents v. Roth, 408 U.S. 564, 577 (1972):

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."

In the area of procedural due process this Court has recognized the role that state law plays in defining federal constitutional protections. Thus in Board of Regents v. Roth, supra, 408 U.S. 564, it was held that non-tenured teachers at a state university did not have a protectable "property" interest in continued employment sufficient to guarantee them various procedural protections prior to their termination because the applicable state law had not created a "legitimate claim of entitlement." (Id., at p. 577.)

In Paul v. Davis, 424 U.S. 693 (1976), this Court noted that defining "liberty" interests for purposes of the Due Process Clause was as difficult as defining "property" interests. The Court stated: "[T]hese interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law." (Id., at p. 710.) Davis went on to hold that because the asserted defamation did not involve interference with a more "tangible" interest created by state law, the petitioner did not have a "liberty" interest in avoiding governmental defamation. (Id., at p. 707.)

It is also significant that in the area of First Amendment obscenity law, where the first step in determining the scope of a constitutional right is to determine whether the material in question is "obscene", the factfinder is required to apply local or state standards, because there is not a definition which is covered solely by reference to the First Amendment. (Roth v. United States, 354 U.S. 476, 485 (1975); Miller v. California 413 U.S. 15, 30 (1973).)

This Court has often specifically referred to state law to determine the validity of arrests made by state and federal officers. (Ker v. California, 374 U.S. 23, 37 (1963); Miller v. United States, 357 U.S. 301, 305-306 (1958); Johnson v. United States, 33 U.S. 10, 15; United States v. Di Re, 332 U.S. 581, 589.) There is thus ample precedent to support the proposition advanced herein, that the scope of one's expectation of privacy in his discarded trash may be defined by reference to relevant state law on the subject. Thus if the State of California has through legislative or decisional law made a specific determination that a particular privacy expectation is reasonable, and such

authority is clear and easily discernible, this should control the question of what is a reasonable expectation of privacy under the Fourth Amendment in California.

In California it has been the law since People v. Krivda, 5 Cal.3d 357 (1971), reaffirmed under the same name at 8 Cal.3d 623 (1973), that under the California Constitution a citizen of California does indeed have a reasonable expectation of privacy in the contents of a trash container placed outside the premises for collection, at least from the snooping eyes and hands of law enforcement officers. This ruling was applied in the instant case (People v. Rooney, 175 Cal.App.3d 634 (1985)), and most recently in People v. Greenwood, 182 Cal.App.3d 729 (1986). Californians thus have a broad, and reasonable, privacy expectation which is specifically included as an inalienable right in the California Constitution. (Cal. Const., art. I, § 1.) Under these authorities Californians reasonably expect that the contents of their trash containers, which may be taken by garbage collectors for purposes of disposal, remain immune from warrantless inspection by law enforcement officers seeking evidence of criminal activity. Firmly

grounded in precedent by the state's highest court, this expectation of privacy should be protected by the Fourth Amendment as it applies in California.

II

ENACTMENT BY THE VOTERS OF THE "TRUTH-IN-EVIDENCE" PROVISION OF THE STATE CONSTITUTION DID NOT ABROGATE CALIFORNIANS' REASONABLE EXPECTATION OF PRIVACY AND CANNOT DIMINISH THEIR PROTECTION UNDER THE FOURTH AMENDMENT

By passage of the popularly-called "Proposition 8", the electorate approved the following amendment to the California State Constitution:

"Right to Truth-in-Evidence.

Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether

heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press." (Cal. Const., Art. I, § 28, subd. (d).)

From its very terms it is clear that this provision does not purport to rescind any federal or state constitutional protections. There is no mention at all of the Fourth Amendment, unreasonable searches and seizures, or of any right to privacy. Indeed it has been held that the substantive portions of the state constitution which guarantee Californians freedom from unreasonable searches and seizures (Cal. Const., Art. I, § 13) were not repealed by enactment of the truth-in-evidence provision. (In re Lance W., 37 Cal.3d 873, 886 (1985).) The California Supreme Court ruled that the effect of the provision was only to preclude state courts from excluding evidence seized in violation of the state or federal Constitutions unless exclusion is compelled by the federal Constitution. (Id., at pp. 888-890.)

In the instant case exclusion of the evidence seized from the communal trash bin is compelled by the Fourth Amendment to the federal Constitution, and state law defining Californians' reasonable expectation of privacy does not compel the exclusion of evidence of its own force, but merely aids in interpreting the scope of the Fourth Amendment in California. Accordingly, it is the exclusionary rule fashioned by this Court, made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961), which operates to bar the seized evidence. Pursuant to the Supremacy Clause of the federal Constitution (U.S. Const., Art. VI, cl. 2), this federal rule of exclusion may not be undermined by any action on the part of the state.

The question as it arises in this case concerns a warrantless search which was illegal as being in violation of the California Constitution and the reasonable privacy expectations of California citizens by the courts of California as protected by that Constitution. However, the question could just as easily be presented as one of substantive statutory law. For example, there is certainly no federal constitutional

compulsion behind the requirement in California statutory law that warrantless arrests for misdemeanor can (with limited exceptions) only be made by a peace officer who has observed the offense. (Cal. Pen. Code § 836, subd. 1.) However, it is certain that under Ker v. California, supra, 374 U.S. 23, any evidence seized as the result of an arrest which was illegal under this substantive law would be suppressed by virtue of the requirements of the Fourth Amendment, even though California law does not provide suppression as a sanction for such illegal conduct. The rule should be no different when it is State constitutional privacy guarantees which are involved. If the State has provided privacy guarantees to its citizens, then those guarantees must be enforceable under the Fourth Amendment. The police conduct in this case was no less illegal because the voters of California have eliminated suppression of evidence as a sanction. This Court must accordingly provide the protection against such illegal police conduct which is inherent in the guarantees of the United States Constitution and the Fourth Amendment.

CONCLUSION

It is clear that a citizen of California has a reasonable expectation of privacy in items placed in a trash receptacle for disposal, since such a privacy expectation is specifically guaranteed by State law. The Fourth Amendment must protect such reasonable expectations of privacy, even if they are not protected by the State which has established the privacy right. For this reason, respondent's expectation of privacy in the contents he placed into the trash container in his subterranean garage must be viewed as reasonable within the meaning of the Fourth Amendment, and the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

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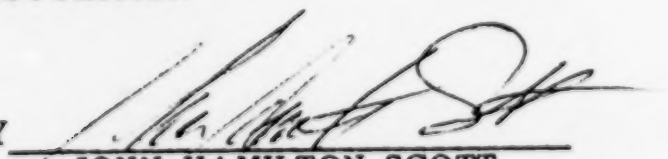
for CALIFORNIA PUBLIC DEFENDERS ASSOCIATION

BY 
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